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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY

OPINIONS BELOW

On November 20, 1959 the decision of Presiding Examiner Kelly was filed with the Federal Power Commission. It is reported at 22 FPC 1102-44 and is printed in the record at JA 1149-1240.[1] The order issued, which was subject to review by the Commission, authorized El Paso Natural Gas Company, a natural gas pipeline as defined in the Natural Gas Act, to acquire by merger pursuant to Section 7(c) of the Natural Gas Act the facilities of Pacific Northwest Pipeline Company, also a natural gas company as defined in the Natural Gas Act, and thereafter to operate Pacific's facilities together with those of its own as an integrated pipeline system, because required by the public convenience and necessity.

The opinion and order of the Commission were issued on December 23, 1959. The order affirmed and adopted the decision of the Presiding Examiner, with the addition of

[1] All references to the printed Joint Appendix, which initially was filed in the Court of Appeals, are "JA ".

certain conditions and issued to El Paso a certificate of public convenience and necessity to acquire and thereafter to operate Pacific's facilities. The Commission's order is reported at 22 FPC 1091-1102 and printed in the record at JA 1290-1310.

The Commission's order denying petitioner's application for rehearing and stay was issued on February 17, 1960. It is reported at 23 FPC 350-52 and printed at JA 1353-58.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (by Prettyman, C. J., joined in by Burton, J., retired, and sitting by designation), which affirmed the orders of the Commission, and the dissenting opinion (Fahy, C. J.), and which were issued on March 30, 1961, have not yet been officially reported. They are printed at JA 1434-47 and the judgment of the Court of Appeals is printed at JA 1447.

STATUTES AND REGULATIONS INVOLVED

The provisions of Section 7 of the Natural Gas Act and Section 7 of the Clayton Act, and other pertinent provisions of the Natural Gas Act and the Commission's Rules of Practice and Procedure are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

The ultimate issue before the Court is:

> Whether the court below properly affirmed the order of the Federal Power Commission authorizing the unification of El Paso and Pacific as an integrated pipeline system pursuant to Section 7(c) of the Natural Gas Act?

Petitioner makes numerous and varied allegations and contentions which, as most broadly viewed, may raise

substantive and procedural questions which we now particularize.

Specificity and Adequacy of Findings and Substantiality of Evidence

1. Are the findings of the Presiding Examiner and the Commission sufficiently specific, and do such findings adequately support the ultimate finding that the merger was required by the public convenience and necessity?

2. Are the findings of the Presiding Examiner and the Commission supported by substantial evidence?

Consideration of the Merger's Impact Upon Costs and Rates and Upon Competition

3. Did the Presiding Examiner and Commission fully and adequately inquire into and weigh the economic impact of the merger, and particularly its impact upon costs and rates?

4. In determining the public convenience and necessity, did the Presiding Examiner and the Commission fully and adequately inquire into and weigh the impact of the merger upon competition?

The Commission's Determination of the Merger Case Before Completion of the Pending But Continued Anti-trust Case

5. Is petitioner precluded from raising the question and, if not, did the Commission properly proceed to hear and determine the applications of El Paso and Pacific for authority to unify and integrate their facilities pursuant to Section 7(c) of the Natural Gas Act without awaiting the outcome of the pending but continued District Court case involving the alleged violation of Section 7 of the Clayton Act in respect of El Paso's acquisition of Pacific's stock?

PROCEDURAL DUE PROCESS

6. Whether, to the extent the Court has jurisdiction to review petitioner's contentions, there is any factual or legal basis for petitioner's contentions that it was denied due process by:

(a) the alleged denial of cross-examination or alleged preclusion of inquiry;

(b) the allegedly improper taking of official notice and the alleged failure to allow evidence in rebuttal thereto;

(c) the alleged failure to delineate issues, and the alleged failure to indicate relevancy of evidence;

(d) the allegedly inadequate consideration given by the Presiding Examiner and the Commission to the evidence and the case;

(e) the alleged ex parte contacts by El Paso representatives with members of the Commission.

STATEMENT OF THE CASE

After El Paso had acquired more than 99% of the stock of Pacific, El Paso and Pacific on August 7, 1957 filed applications with the Commission pursuant to Section 7 of the Natural Gas Act, as amended. These applications sought a certificate of public convenience and necessity authorizing El Paso to acquire the assets of Pacific, by merger, and thereafter to operate Pacific's facilities together with those of El Paso as an integrated pipeline system in the eleven states of the West in which they were operating. (JA 1152-53, 1290).

The El Paso and Pacific Systems Prior to the Merger

The map, which is Appendix B to this brief, shows the location of El Paso's and Pacific's pipeline facilities, together with other actual and proposed pipelines in the West.

(Ex. 1, R. 46, JA 564;[1] see also JA 9-12). It has been inserted in the back of this brief in such a way that it may be opened and fully exposed on a flat surface while the brief is being read. We suggest that reference to it will substantially assist the Court's visualization of this case.

In 1957, El Paso's system consisted of approximately 6,700 miles of main and lateral pipelines, more than 80 compressor stations producing approximately 850,000 horsepower of compression, and other facilities required for the long-distance transmission of natural gas. The principal elements of the system are two parallel pipeline facilities, each consisting of multiple large diameter pipelines, extending from West Texas across respectively, southern and northern New Mexico and Arizona, to the Arizona-California border.[2] Various interconnections between these facilities, in West Texas and southeast New Mexico, in central Arizona, and in western Arizona, enabled El Paso to operate all of its pipeline facilities as a single integrated system. (JA 70, 310, 1161-65, 1291-92, 1435, Ex. 1, R. 46, JA 564, Item T-2, R. 1138, R. 9810-14).

El Paso's market areas, from east to west, are West Texas, New Mexico, Arizona, southeastern Nevada and California. Its principal customers are gas distribution utilities engaged in serving local communities or areas, largely household consumers. El Paso also makes some direct sales for industrial purposes; such sales were approximately 10% of its total sales in 1957. As the map shows, many branch lines to communities in West Texas, New Mexico and Arizona were constructed by El Paso from

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[1] In accordance with Rule 40(2) of this Court the first reference is to the page where received in evidence and the second reference is to the page where such exhibit is found. All references to the original record in the Commission, to the extent not included in the Joint Appendix, are "R. ". "Items" or "items by reference" received in evidence in this proceeding were exhibits incorporated by reference from other El Paso or Pacific Commission proceedings in which previously they had been received.

[2] Unless otherwise indicated, all references to El Paso and Pacific are to the period prior to their unification, which occurred on December 31, 1959 pursuant to the Commission's order in this proceeding.

its large diameter pipelines which extend to California, in fulfillment of El Paso's long announced policy to serve every community within economic reach of its principal pipeline facilities. (JA 12, 40, 310, 394, 1162; Ex. 1, R. 46, JA 564; Item T-2, R. 1138, R. 9703-04, 9711; R. 341, 1567).

El Paso sells gas at the Arizona-California boundary for ultimate consumption throughout California to three companies: to Pacific Gas and Electric ("PG&E"), which serves the northern California area and is among the largest utilities in America engaged in the distribution of natural gas and the generation and distribution of electricity; and to the Southern California Gas Company and the Southern Counties Gas Company of California ("Southern California Companies") which are affiliated, and which together are among the largest utilities in America engaged in the distribution of natural gas. (JA 12-13, 1160-62, 1295, 1435).

In 1957, El Paso sold approximately 306 billion cubic feet of gas to PG&E and approximately 328 billion cubic feet of gas to the Southern California Companies, or a total of approximately 634 billion cubic feet of gas to such customers for subsequent distribution to ultimate consumers in California. In the same year, El Paso sold to its other customers in the Southwest a total of approximately 229 billion cubic feet of gas. Thus, El Paso sold to customers in the Southwest, other than California, approximately 36% of the amount of gas supplied by El Paso to the California market. (Item T-2, R. 1138, R. 9703-11).

El Paso relies most heavily on residue gas (or "flare gas"), for its gas supply. Such residue gas is obtained principally in the oil rich Permian Basin of West Texas and eastern New Mexico. (JA 27, 1205-08, 1298).

"Residue gas" is produced in conjunction with oil and its production and availability are dependent upon the hourly, daily, weekly and monthly fluctuations of oil production and, not by the needs or demands for natural gas. Oil

production is controlled and regulated by state agencies which fix "allowables" based on monthly estimated oil requirements. (JA 26-29, 304, 316, 407, 1207, 1298).

El Paso had pioneered the utilization of residue gas, particularly in the Permian Basin of West Texas and New Mexico with the consequence of a great conservation of valuable natural resources which otherwise, as it had been in the past, would have been flared and wasted during oil production. (JA 26-27, 29-30, 316-17, 1205, 1207; 9 F.P.C. 170, 180; 16 F.P.C. 1354, 1355).

Because of the wide "swings" in the availability of residue gas, and in order to assure continuous and dependable service to the gas consuming public, El Paso had to have available large quantities of "dry gas". "Dry gas" is produced from a gas stratum which does not contain oil and such gas may thus be used to meet the needs of the consumers when and to the extent that residue gas is not available. The acquisition of new and large quantities of dry gas also would add to the total overall gas supply available to meet consumer requirements. (JA 30, 317, 377, 1298).

A substantial portion of dry gas reserves available to El Paso is in the San Juan Basin, where exploration and development had been stimulated by El Paso as a result of its need for new and large quantities of dry gas reserves, to satisfy the tremendous growing needs of the rapidly expanding populace in California and the Southwest. (JA 317, 1198, 1205, 1292, 1298).

The Pacific system consisted of approximately 2,125 miles of main and lateral pipelines; and 18 compressor stations with a capacity of approximately 91,000 horsepower (JA 807, 811; Item D, R. 1230, R. 774-75) a substantial portion of which was not being utilized. (Ex. 337, R. 1229, JA 805-06; Ex. 338, R. 1229, JA 809-10). Pacific had been certificated by the Commission in 1954 to provide natural gas to the general public and to existing and poten-

tial industries in the Pacific Northwest, the last major area of the United States without such service. (JA 4, 13, 208-09, 1165-66; Ex. 1, R. 46, JA 564; Ex. 337, R. 1229, JA 805-07; Ex. 338, R. 1229, JA 809-11; Item D, R. 1230, R. 774-75).

Pacific's line has its point of origin in the San Juan Basin of Southwestern Colorado. It winds its way about 2,000 miles north and northwest across the Rocky Mountains of Colorado, Utah, Wyoming and Idaho, through northern Oregon and thence north, with one branch extending through eastern Washington, and with another branch extending through western Washington to the Canadian boundary. (JA 13; Ex. 1, R. 46, JA 564; 13 F.P.C. 221, 228; 14 F.P.C. 157, 167).

By 1957, Pacific had an overabundance of gas supply from three distinct sources, and substantially all of which was dry gas. Pursuant to Commission authorization Pacific was connected to and obtained large quantities of Canadian gas, of San Juan gas and of gas from the newly explored and developing gas producing regions of the Rocky Mountains which its pipeline traversed. Moreover, the physical location of its pipeline gave Pacific access to the great new potential reserves of Canada and the Rocky Mountain area. (JA 1165-66, 1168-70, 1199-1205, 1292, 1298).

In 1957, Pacific sold in its market areas of the Pacific Northwest approximately 123 billion cubic feet of gas (or about 14% of the total amount sold by El Paso in the Southwest and to California in 1957, which was approximately 863 billion cubic feet of gas). Sales by Pacific were divided into three principal classes: to gas distribution utilities; to direct industrial customers such as companies in the chemical, aluminum and other non-ferrous metal industries; and to two pipeline customers, Colorado Interstate Gas Company and Mountain Fuel Supply Company, which together purchased approximately 49 billion cubic feet of gas during 1957, or some 40% of Pacific's total sales during that year. (JA 1166; Item X-2, R. 1138, R. 10153-66).

Pacific's sales in 1957 were very substantially below its certificated capacity because its original market estimates as presented to the Commission prior to its certification in 1954 fell far short of fruition. Pacific was unable to provide the necessary financial resources to stimulate market development. (JA 234, 1204, 1210-12, 1299-1300).

By the beginning of 1957, Pacific was faced with difficult and immediate financial problems due to its overestimation of its market sales and revenues, the fact that its actual costs of construction far exceeded its initial estimates, and its inability to produce the volumes of natural gas by-products it had estimated and to sell such products at the prices it had anticipated. (JA 52-54, 58, 62, 106-07, 448-49, 456, 465, 510, 1210-12, 1299-1300).

At the same time, Pacific had large and continuing debt and interest obligations. More than 75% of Pacific's capital was debt capital. Under its mortgage indenture, Pacific could not undertake any new financing until 1959, and then only if certain earnings tests were met. (JA 56, 97, 470-71, 502-03, 510, 1213; R. 2108-09; 13 F.P.C. 221, 230-31; 14 F.P.C. 157, 168-69).

Faced with financial difficulties which made the stimulation of adequate market development difficult, if not impossible, and with a pipeline which had substantial idle capacity, Pacific, was, therefore, a pipeline with access to potentially large quantities of natural gas, in the San Juan Basin, throughout the newly explored Rocky Mountain region and from Canada, which it could not utilize. (JA 47, 50, 57-63, 268, 270, 375, 419-20, 1204, 1208-09, 1212, 1219-20, 1298; Ex. 337, R. 1229, JA 805-07; Ex. 338, R. 1229, JA 808-11).

El Paso, in contrast, was a financially strong gas supplier, and was operating virtually at capacity, but with an apparently insatiable market which needed access to new and large quantities of gas reserves, particularly dry gas reserves, to assure continuous and dependable service dur-

ing the physical lifetime of existing pipeline facilities and to support the construction of new pipelines to help meet the ever increasing needs of the California and Southwest markets. (JA 250, 1214, 1215-17, 1299).

Pacific had available facilities and potential resources which if used together with those of El Paso could maximize present and future use of such facilities and resources in the public interest. The Commission reached that conclusion and made that finding.[1]

The creation of this integrated pipeline system, as the Commission found, would satisfy the requirements of the public interest in relation to the needs of the consumers of the western part of the United States.

The operation of this integrated system would mean that gas reserves from the Permian Basin and the San Juan Basin in the Southwest, from the Rocky Mountain region and from Canada would be available to all customers of El Paso and Pacific. Gas is a wasting and exhaustible resource; hence the unification of El Paso and Pacific would mean that the service rendered through presently certificated facilities would be lengthened through use of newly-developed reserves to which Pacific has access. These new reserves also may be used to serve future market demands of the combined system.

Consumers would benefit from increased exploration and development of gas resources, which would be accelerated by the merger. In the Rocky Mountain region, Pacific, with its overabundance of potential supply and underdeveloped markets, is unable to provide the necessary stimulus.

Future consumers' demands also would be better fulfilled by connecting Pacific's substantial dry gas reserves with El Paso's substantial residue gas reserves, and would make available increased quantities of residue gas which otherwise would be flared and wasted.

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[1] The text through page 12 is based on the findings of the Commission (JA 1149-1240, 1290-1310).

Additional gas reserves located anywhere in the vicinity of the entire merged system can be attached and delivered to consumers at lower capital cost, and consequently lower rates, than would otherwise be the case if the two companies were separate.

In the absence of the unification of El Paso and Pacific, the financial problems of Pacific would be a substantial impediment to the expansion of natural gas service in the Northwest. Consumers and industries within economic reach of Pacific's facilities should not be denied the opportunity to use natural gas.

Consumers and potential consumers of the integrated system would be afforded a number of other tangible benefits. The merged company would be able to acquire debt and equity capital more readily and on more favorable terms than would be possible by either company—this "cost of money" is reflected in rates. The merger would defer and reduce increases in rates to customers of Pacific. The merger would result in substantial savings in operating expenses—which again would be reflected in lower future rates than otherwise would occur. The substantial benefits of a portion of tax loss carry-forwards, generated by Pacific in 1955 and 1956, which in the absence of the merger would be lost, would inure to the benefit of the consumers of the merged system.

Customers of the combined system would have increased assurance of uninterrupted and dependable service as a result of increased availability of "dry gas" reserves and a complete flexibility in day-to-day operations which the integration of El Paso and Pacific would permit.

Consumers would be served by the integration of Pacific and El Paso since it would facilitate the development of additional loads for the facilities of Pacific so that maximum use can be made of such facilities which now are partially idle. It should accelerate the formulation and presentation to the Commission of proposals for additional gas

service to the entire West. It should lead to the movement of increased volumes of gas to California in large diameter pipelines which run through Washington, Oregon and Idaho and should permit expanded service to communities in those states at lower cost, just as El Paso's service to California has permitted such expanded service to communities in New Mexico and Arizona.

El Paso and Pacific were physically, geographically and economically complementary. Each had available the resources the other needed to meet its most pressing needs. These conclusions were reached in early 1955 by the El Paso management and account for El Paso's acquisition of Pacific's stock and the applications which El Paso and Pacific filed with the Commission for authority, under Section 7(c) of the Natural Gas Act, to unify their facilities and to carry on their public service functions as an integrated pipeline system pursuant to Commission regulation, to the benefit of consumers and to advance the interests of holders of El Paso's and Pacific's equity and debt capital. (JA 18, 1171-73).

How and why the El Paso management concluded in early 1955 that it would be in its interest and in the public interest to create a unified El Paso-Pacific system and how and why El Paso and Pacific's applications were brought to the Commission in 1957 for its determination of whether such unification would be in the public interest is told in the succeeding pages of this Statement of the Case.

This story has one beginning at the close of World War II when El Paso began to transport natural gas from the Permian Basin of West Texas, primarily residue gas which theretofore had been flared and wasted, a thousand miles across the mountains and deserts of the Southwest to California. The story has its other beginning in 1949 when Pacific filed with the Commission the first of a series of applications for authority to construct a pipeline to the Pacific Northwest area, which, in 1954, when Pacific was

certificated, was the last major area in the United States not yet served with natural gas.

The History of El Paso's Operations Until the End of 1954 and Early 1955, at Which Time El Paso First Sought Unification With Pacific

1. *The Early Years: 1928-1945.*

El Paso was organized in 1928 and commenced the delivery of natural gas to El Paso, Texas in 1929. (JA 1159, 1435). At that time and for the years which followed until the end of the second World War, natural gas was of little importance as a fuel to help meet the energy requirements of this country. Most of the gas produced was residue gas (or "flare gas"), a by-product from the production of oil, and that gas was flared and wasted. There was no way to conserve it since it could not be produced independently of the production of oil.[1]

Most of the residue gas which was produced could not be sold; the little which was sold was at prices below 2¢ per thousand feet of gas and often a fraction of a penny for a thousand feet of gas. No effort was made to explore for or develop dry gas, found in a gas stratum and not in conjunction with oil, because once produced it had little or no commercial value. The dry gas which was discovered largely resulted from unsuccessful exploration for oil.

State conservation laws, particularly related to oil production were only beginning to be enacted; and absent any means to utilize natural gas as a fuel, there were only limited means, principally use of gas for repressurization of oil wells, by which such laws could operate to effect conservation of natural gas.

El Paso's initial pipeline, which was completed in 1929, was approximately 200 miles in length, from the Permian Basin of West Texas westward to El Paso, Texas, and with

[1] With respect to the matters described in this and the following two paragraphs, see Federal Trade Commission Report No. 84-A, S. Doc. 92, 70th Cong., 1st Sess. (printed in 1936), e.g. at pp. 55-56, 86-110, 159-160, 198-208, 602-604.

a delivery capacity of 36 million cubic feet of gas per day. (JA 1159).

During the 1930s and early 1940s, El Paso constructed extensions of its system to the developing markets of New Mexico and thence westward to the Douglas, Bisbee, Tucson and Phoenix areas of Arizona. (JA 39-40, 290, 310).

In 1938, the Natural Gas Act was enacted and brought within Commission regulation the operations of interstate natural gas pipeline companies, one of which was El Paso. (JA 311). Thus began El Paso's experience of more than twenty-years under regulation, during which time it expanded its service more than twenty-fold.

By 1945, the El Paso pipeline system consisted of approximately 2,000 miles of medium and small diameter main and lateral transmission lines with a capacity of approximately 150 million cubic feet of gas per day. (JA 290; Item U-2, R. 1138, R. 9871).

2. *The initial importation of natural gas into Southern California and the expansion of supply to Arizona: 1946-1948.*

Shortly after the end of World War II, El Paso undertook the delivery of natural gas to the rapidly expanding Southern California market. Pursuant to contracts El Paso executed with the Southern California Companies, El Paso applied to the Commission for certification of proposed large diameter pipelines, at an estimated cost of $70 million, from the Panhandle of Texas and the Permian Basin of West Texas, to California. El Paso contracted to deliver an initial volume of 125 million cubic feet of gas per day and an ultimate volume of 305 million cubic feet of gas per day. (JA 290-91, 311, 1160; 5 F.P.C. 115, 119; 9 F.P.C. 170, 178-179).[1]

[1] The volumes of gas described in this brief, as in the Presiding Examiner's opinion, are at 14.9 p.s.i.a. (pounds per square inch atmosphere). Though not in the particular instance above, frequently the Commission in its decisions, some of which are cited hereafter, has described the volumes of gas involved at 14.73 p.s.i.a. At 14.73 p.s.i.a. pressure, the volumes are slightly larger than at 14.9 p.s.i.a. pressure.

On May 31, 1946, the Commission certificated this project involving the construction of El Paso pipeline facilities at a cost of $54 million. (JA 1160; 5 F.P.C. 115, 123). The Commission found that "within a short period of time the available local gas supply [from California sources] will not be sufficient to meet the firm demands [from domestic consumers] for gas upon the California applicants [the Southern California Companies], which would result in serious detriment to the public interest" (5 F.P.C. at 121).

The Commission found that the project fostered conservation; but at the same time the use of the fluctuating supply of residue gas created continuing operating difficulties:

> ". . . An important consideration supporting the granting of this certificate is the strong showing by El Paso that it will probably utilize presently wasted Permian Basin oil-well gas for approximately 75 percent of the maximum requirements of 305,000 M.c.f. a day and take the remainder from the dry gas Panhandle and Hugoton Fields. This utilization of wasted natural gas for beneficial public use fosters a sound policy of conservation.
>
> "All applicants agree that it is essential to back up the Permian Basin oil well gas with the dry gas reserves of the Panhandle-Hugoton area in order to finance the project. Also this combination of supply sources is required by the California applicants as an indispensable part of the project. It is well known that there are inherent difficulties in obtaining a long and continuous supply of surplus gas from oil fields." (5 F.P.C. at 122-23)

Deliveries of gas for ultimate consumption in Southern California began in October of 1947 and by February of 1949, a year and a half ahead of schedule, deliveries attained the contract maximum of 305 million cubic feet per day. (JA 291-92).

At the same time that El Paso was going forward with the supply of natural gas to California, it continued to

meet the increasing demands of its other customers. (JA 290-91, 311).

Upon application by El Paso, in December of 1947, the Commission certificated construction of pipelines of small and medium diameter for the delivery of an additional 20 million cubic feet per day to the cities of Tucson and Phoenix and 22 smaller Arizona communities. (JA 290-91, 311; 6 F.P.C. 1104, 1105-06).

3. *El Paso commences the supply of natural gas to northern California and substantially increases its deliveries to Southern California and to the southwestern markets: 1948-1949.*

(a) *Initial supply to northern California*

In 1946, when El Paso first agreed to supply gas to the Southern California Companies for ultimate consumption in the Southern California area, PG&E, which serves northern California, was not as yet prepared to purchase out-of-state gas (R. 329-30).

By 1948, supplies of gas available from California sources were on the decline and PG&E required out-of-state gas to meet its existing requirements and its rapidly rising consumer requirements. In order to meet these market demands, El Paso embarked upon a campaign of purchasing large quantities of residue gas in the Permian Basin, and supplementary quantities of dry gas from the Panhandle Field of Texas and from the Lea County Field in southeastern New Mexico. (R. 1350-51; 8 F.P.C. 726, 728, 729; 9 F.P.C. 170, 179).

As a consequence, El Paso agreed to deliver to PG&E up to 250 million cubic feet per day. (JA 292, 311, 1160-61; 8 F.P.C. 726, 727).

On February 28, 1949, the Commission certificated this project which would require the construction of El Paso pipeline facilities at a cost of $52 million. (JA 1160, 1190; 8 F.P.C. 726).

The Commission found that PG&E "like other utilities in the state of California has experienced a constantly mounting demand for natural gas and is confronted with increasing difficulty in obtaining adequate supplies of gas to meet its requirements from available sources within the state" (8 F.P.C. at 729; JA 1190), and that

> "[PG&E's] estimates disclose that even if it received the volumes of natural gas as originally proposed from El Paso, it would be unable to meet its firm peak-day gas requirements from all available sources of gas and that on an average daily basis its supply has been and will be deficient in meeting both firm and interruptible requirements. . . ." (8 F.P.C. at 729)

The Commission found that as to gas supply:

> "It is the intention of El Paso to take the greater proportion of its natural-gas requirements from the oil fields in the Permian Basin and to supplement this supply, particularly in the latter years of the project with dry gas from the Panhandle and Lea County fields. In connection with the supply of casing-head and residue gas from the Permian Basin it may be noted that the Texas Railroad Commission has urged favorable action on this application, for the reason that the project proposed therein will assist that commission in its efforts to conserve the gas reserves in the Permian Basin, as much of the gas there presently produced is vented to the air. The testimony shows that the El Paso system is the only major natural-gas pipeline providing a market for natural gas from the Permian Basin including the Lea County dry gas fields and that contracts for a supply of additional gas from such areas could probably be secured." (8 F.P.C. at 728)

(b) *Additional deliveries to Southern California and the Southwest*

In addition to El Paso's effective response to PG&E's need to service the consumer demands of northern Cali-

fornia, El Paso in 1948 met new demands of southern California, which by that time had exceeded the estimate on which the 1946 sales of 305 million cubic feet per day had been premised. (R. 330). El Paso also met the new needs in Arizona, New Mexico and West Texas. El Paso promptly applied to the Commission for authority to construct new facilities, at a cost of approximately $56 million, to deliver an additional 100 million cubic feet per day to the Southern California Companies, an additional 80 million cubic feet per day to customers in Arizona, New Mexico and West Texas (JA 292, 311-12, 9 F.P.C. at 179), including natural gas service for the first time to Yuma and Nogales, Arizona. (JA 292, 311-12, 7 F.P.C. 908).

El Paso acquired the supply for this project, which was certificated by the Commission on September 10, 1948 as the result of its gas purchasing campaign in the Permian Basin. (R. 1350-53; 7 F.P.C. 908, 9 F.P.C. 170, 179).

4. ***El Paso's intensive search and need for large new reserves, particularly dry gas, begins in 1948. El Paso pioneers in the exploration and development of the dry gas region of the San Juan Basin to improve the existing residue gas - dry gas ratio problem; to acquire sufficiently new large quantities of dry gas in order to increase the amount of residue gas which could be acquired to meet consumers demands; and to increase substantially the total gas reserves available for delivery to consumer markets.***

El Paso's operations and efforts in the period 1948-1956 are set in the context of the increasing demands of the California and Southwest markets, the problems of finding large new quantities of gas to support the construction of new pipelines and their continued use during their physical lifetimes, and the problems involved in utilizing residue gas. (JA 1161, 1205, 1297-98).

With the demands of California and the Southwest increasing during the immediate post-war period, El Paso undertook further deliveries to meet the requirements of these markets. (JA 1161-62).

In its opinion in 1950 relating to El Paso's first application to utilize dry gas produced in the San Juan Basin, by which time 74% of El Paso's gas supply was residue gas (or "flare gas"), the Commission emphasized both the benefits to the public in the utilization of the residue gas, its conservation and use by consumers rather than its waste by flaring, and the concomitant problems in assuring dependable and continued service. A supply of residue gas to household users for house-heating and cooking purposes, with no assurance of continuance, and which can go on one day and off the next, can not fulfill such household needs. (JA 1205-07; 9 F.P.C. 170, 180-81).

As the Commission said in 1950:

> "While it is unquestionably a real service in the public interest to market such a considerable volume of flare-gas, it imposes on the company a task of some magnitude to provide an ever-ready and adequate reserve of dry gas, since flare gas is available wholly as a result of the production of oil, and the height of oil production is in the summer and not during the winter when El Paso experiences its system-wide peak demands for gas.
>
> "Another and equally important reason for a pipe-line company to maintain an ever-ready supply of dry gas, when relying upon a large volume of flare gas for the supply to meet its own pipeline demands, is because the Railroad Commission of Texas and the Oil Conservation Commission of New Mexico may in any given month reduce the allowable production of oil, thereby reducing the availability of residue gas. Such oil allowables are fixed by those state agencies each month for each well in each field, and generally it is done by fixing the number of barrels per well per day for a stated and

varying number of days per month. A variation in such oil allowable of as low as one day per month is calculated to result in a loss of approximately 20 million cubic feet per day of available flare gas to El Paso. It is not uncommon for a reduction of the number of days of producing oil to be as many as three or four, hence it is obvious that the pipe line may have to provide additional dry gas in volumes ranging from 20 to 60 or even 80 million cubic feet per day. This can and often does occur, month by month.

"The volumes of residue gas which El Paso expects to take from the Permian Basin aggregate about 750 million cubic feet per day, and the company's present maximum supply of about 250 million cubic feet per day of dry gas in the Permian Basin, even considering its potential of dry gas from the Panhandle-Hugoton fields, is insufficient in solving the problem created by marketing such a large volume of residue gas." (9 F.P.C. at 180-81; JA 1205-06)

The flow of residue gas, upon which El Paso so heavily relies, is regulated principally, by the Texas Railroad Commission and similar agencies of other states, which hold monthly meetings. At these meetings, oil producers, including companies which market oil from the Permian Basin in Texas and southeastern New Mexico nominate how much oil they desire to produce. With this information the state regulatory agency fixes an allowable number of producing days per well. This does not mean, however, that each well is produced the allowable number of days and then shut in. Rather, the total allowable production is generally spread out over most of the days of the month. (JA 27-29, 304, 316, 407, 1207, 1298).

Because an allowable cannot be made up after the month, most oil producers complete their allowable and shut in their wells a day or two before the end of the month. This takes a tremendous amount of gas off the El Paso

system at the month's end and creates significant operating difficulties. (JA 28-29).

Furthermore, on a cold day, when El Paso's need for gas is the greatest, the amount of residue gas produced is substantially less per barrel of oil produced on warmer days; and oil producers do not get out in the field so early in the morning to turn on their wells. On one cold day in 1957, El Paso had to supply 500 million cubic feet of dry gas, which by then it had acquired, to make up the deficiency in residue gas. (JA 29).

In short, there is no way for El Paso to regulate the flow of residue gas in relation to its demand for gas. Residue gas is regulated only by the flow of oil and El Paso must be ready to take such gas when it is produced. (JA 29-30, 1207-08).

El Paso must have dry gas which it can turn off and on at will to take care of residue gas deficiencies. Consequently, El Paso has constantly striven, since 1948, to build into its system excess capacity from dry gas wells and to reduce the percentage of residue gas which it uses. (JA 30, 317, 377, 1298).

Through the years since 1950, the Commission in various decisions relating to El Paso's gas supply has reiterated the benefits flowing from the use of residue gas and at the same time El Paso's need to constantly raise the ratio of dry gas to residue gas. Also, the Commission has pointed to the benefits to the consuming public which result from increased ability to take larger and larger quantities of residue gas as additional quantities of dry gas are discovered and connected to the El Paso pipeline system. (JA 316-17, 1205-07; 5 F.P.C. 115, 122-123; 9 F.P.C. 170, 180-81, 16 F.P.C. 1354, 1355).

El Paso recognized this problem in 1948 and went to work to try to meet it. The problem was not static, however. As market demands increased, the need to use the

large available quantities of residue gas increased because of the greater availability of such gas to meet the market needs. This, in turn, produced greater pressure to find and acquire larger and larger quantities of dry gas, first to keep pace with the increasing deliveries of residue gas and second to attempt to increase the ratio of dry gas to residue gas. (JA 317, 377).

It was El Paso's idea to seek to develop reserves in the then relatively unexplored and undeveloped San Juan Basin of northwestern New Mexico and southwestern Colorado, which was known to be a potential dry gas area. It was El Paso's idea that if sufficient dry gas reserves were developed, they could be used, upon construction of new pipeline facilities, as a reservoir to meet the tremendous fluctuations in residue gas supply from the Permian Basin. (JA 298-99, 317, 1163, 1205-07, 1298).

In 1948, El Paso contracted with PG&E to supply an additional 150 million cubic feet per day from a proposed pipeline to be constructed from the San Juan Basin across northern Arizona to the Arizona-California boundary. El Paso also agreed to supply, for the first time, several cities in northern Arizona along the route of the proposed line. (JA 311-12; 8 F.P.C. 991, 992).

On the basis of these agreements, when El Paso filed its application in 1948 it brought to the Commission the first proposal to supply gas out of the San Juan Basin.

The Commission found that PG&E required additional volumes of gas

> "... in order to meet constantly mounting demands for natural gas upon its system and because of increasing difficulty in obtaining adequate supplies of natural gas to meet its requirements from available sources within California." (8 F.P.C. 991, 995).

But, the Commission denied the application (8 F.P.C. at 996) because it found El Paso's proven reserves in the San

Juan Basin represented only enough gas to insure continuing delivery for 3½ years and because El Paso "does not have contracts for the purchase of gas necessary to support its contractual sales commitments." (8 F.P.C. at 994).

Though the Commission found that there was "no assurance that El Paso will have available to it a firm supply of natural gas", it concluded that El Paso should be afforded a further opportunity to submit additional evidence as to its gas supply at further hearings. (8 F.P.C. at 991, 994, 996).

5. *El Paso continues to meet the growing demands of its markets and the Commission issues a certificate for the first pipeline from the San Juan Basin to serve northern Arizona and California: 1950-1952.*

As a consequence of the Commission's denial of its first application to take gas from the San Juan Basin westward to northern Arizona communities and to PG&E, El Paso undertook a program of developing and acquiring San Juan Basin acreage with proven gas reserves and entering into gas purchase contracts to accumulate sufficient gas supply to support certification of a pipeline from the San Juan Basin. (9 F.P.C. 170, 181).

In 1950, after hearings held that year, the Commission certificated the construction of proposed pipeline facilities from the San Juan Basin to California, upon El Paso's amended application. Authority at that time was requested, however, for service from the San Juan Basin to meet "peak day demands only", as a method of meeting the fluctuations in delivery of residue gas and to assure that market demands were continually and dependably fulfilled. (JA 298-99, 1163, 1205; 9 F.P.C. at 184).

The peak day demands were estimated by the Commission to approximate 34 billion cubic feet per year; and the

Commission found that El Paso had available, by reason of acreage it had acquired and gas purchase contracts it had entered into, 15 years supply of 34 billion cubic feet per year. Consequently, the certificate limited El Paso's deliveries from the San Juan Basin to that amount, until a further showing was made of additional supply. (JA 312-13; 9 F.P.C. at 184).

The Commission's decision was prompted, in large part, as the quotation from that decision at pp. 19-20, supra shows, by the need to balance residue gas deliveries with additional dry gas supply. (9 F.P.C. at 186; JA 1205-06). Further, the new line from the San Juan Basin was to be "operated as an integral part of El Paso's entire system" as a result of its connection near the Arizona-California border with El Paso's large diameter pipeline in the south of Arizona which extended from the Permian Basin. (9 F.P.C. at 182; JA 298-99).

The Commission also made this prediction:

> "Bearing in mind that this San Juan Basin area has not been developed very much, largely it would seem because of the lack of sufficient market, it seems quite reasonable to assume that further development in the area will occur in the near future, just as we note further development has taken place since we last heard this case in June 1949. And, upon the granting of El Paso's application, El Paso will be in a position to develop and contract for additional volumes of gas." (9 F.P.C. at 184)

The Commission's prediction was more than fulfilled. From this time forward the San Juan gas was used together with the Permian Basin gas in making deliveries principally to PG&E and also the Southern California Companies at Topock, Arizona, and to various cities and towns in northern and central Arizona and northern New Mexico. (JA 311-14; R. 2300-05; Ex. 1, R. 46, JA 564).

In 1951, El Paso filed an application for authority to deliver an additional 320 million cubic feet per day to the Southern California Companies and to PG&E and, for the first time, to southern Nevada, and the construction of necessary pipeline facilities, at a cost of $108 million. (JA 312-13; 11 F.P.C. 1071).

El Paso proposed to take an additional 120 million cubic feet per day from the San Juan Basin and an additional 200 million cubic feet per day from the Permian Basin. El Paso also requested that in view of the large new gas supplies acquired, the Commission's limitation of takes from the San Juan Basin to 34 billion cubic feet per day, be removed. (JA 312-13; R. 2301; 11 F.P.C. 1071, 1072-74).

In June of 1952, the Commission certificated this project. (11 F.P.C. at 1079). It found, among other taings, that El Paso had acquired substantial additional commitments for reserves in the San Juan Basin justifying the removal of the previously imposed restriction upon El Paso's deliveries from that Basin. (11 F.P.C. 1071, 1074; see pp. 23-24 supra).

The Commission found that El Paso had gas supply to support the use of its existing and newly certificated facilities for 15 years:

> "Availability studies covering a 17-year period indicate that El Paso's estimated 1957 annual firm demands on its Permian system can be met through 1967. The availability studies presented in support of both the San Juan Basin and the Permian Basin are based upon present sources of supply only, and do not take into account additional volumes of gas which are now being contracted for by El Paso, particularly in the Permian Basin. These studies, however, disclose that El Paso will be able, from present sources of supply to meet its estimated 1957 annual requirements for a period of 15 years." (11 F.P.C. at 1074)

El Paso has at all times stated and fulfilled the policy of serving all communities within economic reach of its pipelines. In the several expansions of El Paso pipelines and service to California, provision was consistently made for additional capacity to serve the needs of communities on route, in Texas, New Mexico and Arizona. (JA 40, 144-46, 418-19, 439-40, 1218-1219, 1298; R. 1670).

El Paso's publicly announced policy has been that every community would be served if it were within economic reach of its pipelines. If there were any question about economic feasibility, El Paso would build a tap from which anyone could build a lateral off the El Paso line. El Paso has built laterals and, today, there is no community of any size in the areas traversed by El Paso's pipelines which does not have natural gas service. (JA 40, 418-19, 439-40; R. 1670).

Moreover, the demands of El Paso's customers in the Southwestern states, other than California, have not been required to await fulfillment of new projects to California. In November of 1951, the Commission authorized El Paso to construct new pipeline facilities, at a cost of approximately $23 million, to deliver an additional 100 million cubic feet to El Paso, Texas, Phoenix, Arizona and intervening areas from the Permian Basin and the nearby Lea County Field in southeastern New Mexico. (JA 312; R. 2302; 10 F.P.C. 633, 636, 638-40).

In that proceeding, the staff of the Commission urged a limitation upon El Paso's sales to interruptible industrial customers, "because of the fear that dry gas reserves might become depleted and such should not occur by industrial use of the gas". (10 F.P.C. at 640). The Commission, in rejecting this contention, stated:

> ". . . Aside from end use considerations, the entire integrated operations of El Paso preclude any definite label-marking of particular quantities of gas,

> and the dry gas reserves may be used by utility customers if their demands increase. A further answer to such a staff request for a limitation in the certificate is that El Paso witnesses testified that flare gas may well exceed the definitely committed quantities reflected in this proceeding, and day to day operations with flexibility in takes of flare gas should not be limited by precluding industrial uses of gas, especially at this time, when most of the interruptible load serves vital defense industries, the products of which are in very short supply." (10 F.P.C. at 640)

6. *El Paso further expands to meet the rapidly increasing demands of its market and fully integrates its entire pipeline system by connecting the San Juan Basin and the Permian Basin: 1953-1954.*

On June 29, 1953, the Commission certificated the next major project of El Paso to meet the increasing demands of the California and Southwest markets. El Paso was authorized to construct pipeline facilities, at a cost of $175 million to deliver an additional 300 million cubic feet per day to its California customers and an additional 100 million cubic feet per day to its customers in other Southwest areas. (JA 313-14; R. 2302; 12 F.P.C. 1037).

The Commission found, however, that despite these deliveries from El Paso:

> ". . . the southern California companies will experience deficiencies in meeting their requirements both for peak day and annual demands beginning with the year 1954." (12 F.P.C. at 1040)

* * * * *

> "The need for additional gas in the territory served by [PG&E] results from a decline in the availability of natural gas produced in California, and in-

> crease in its load growth. With the additional gas to be purchased from El Paso, [PG&E] will experience deficiencies in meeting its requirements, both for peak day and annual demands beginning with the year 1954." (12 F.P.C. at 1042)

These findings are of extreme significance when, in late 1954 and early 1955, as the story later unfolds, El Paso became interested in acquiring access to Canadian and Rocky Mountain reserves by acquiring Pacific. (JA 17-18, 303-04, 317-18, 320-21, 353-54, 359, 1168, 1171, 1196, 1293).

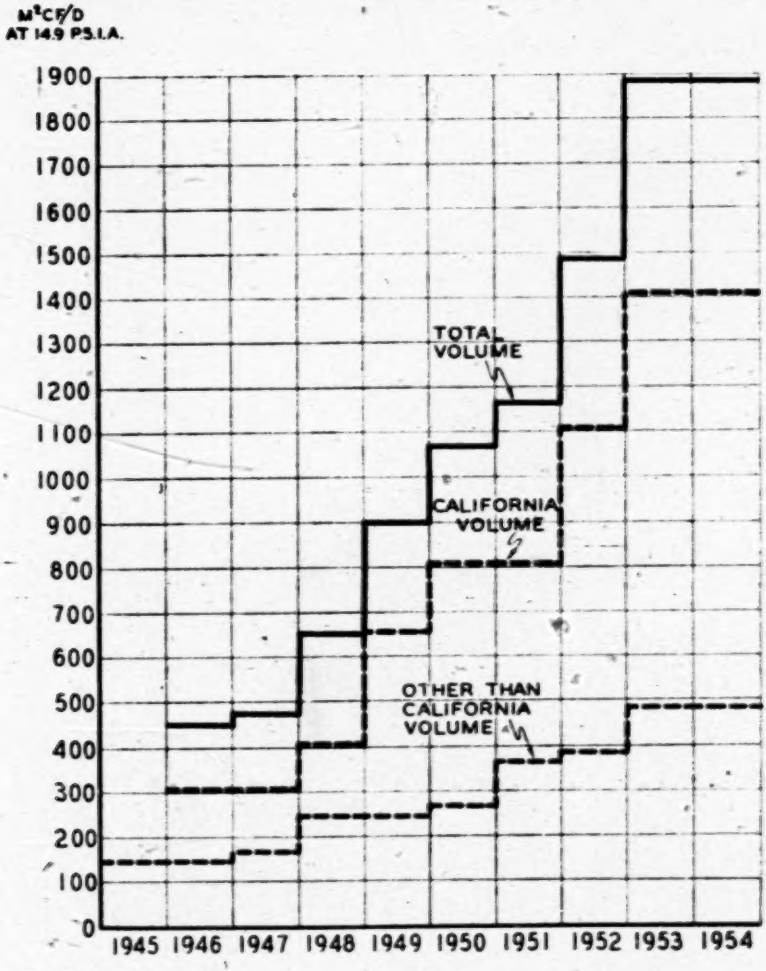
To make this new 1953 project possible, construction was required of a new pipeline linking the San Juan Basin of northwestern New Mexico, with its large quantities of dry gas, with the Permian Basin of West Texas, the primary source of residue gas. This enabled El Paso to utilize further the San Juan gas to meet the "swings" of Permian Basin residue gas deliveries. (12 F.P.C. at 1039; Ex. 1, R. 46, JA 564).

When this new and important four-hundred mile El Paso pipeline link between the Permian Basin and the San Juan Basin was completed in 1954, together with the other facilities involved in the new project, El Paso was able to operate all of its pipeline facilities as a completely integrated system. The dry gas of the San Juan Basin could be moved westward to California to the extent residue gas from the Permian Basin became unavailable. (JA 70, 1162-64).

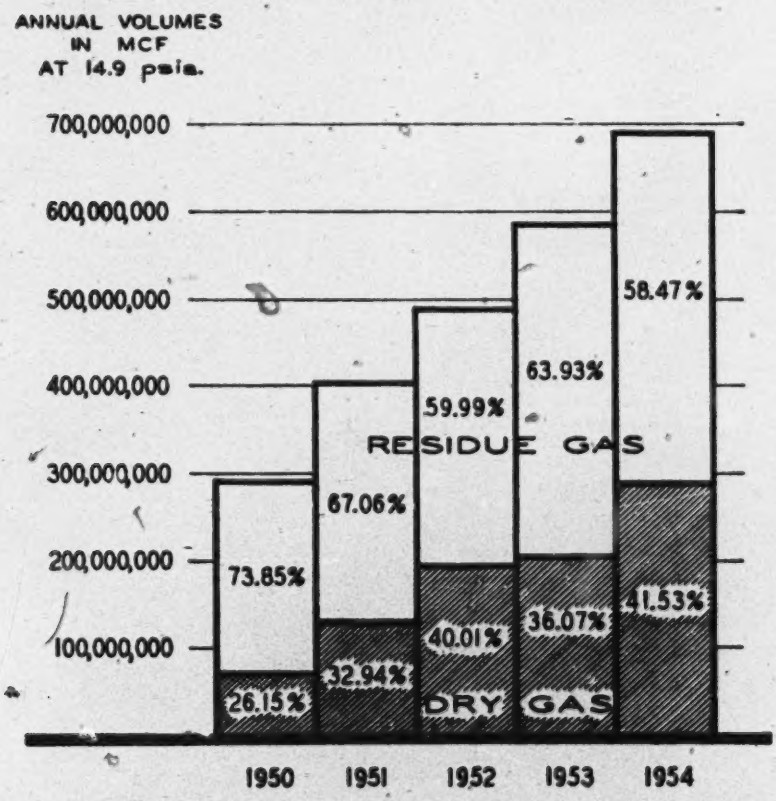
Also, as the map (Appendix B) shows, great quantities of gas to be transported to California from the Permian Basin could be moved through the southern facilities or the northern facilities, or both, giving El Paso flexibility and ability to meet emergencies. (JA 1162-64; Ex. 1, R. 46, JA 564).

7. *Summary of El Paso's Expansion to Meet Market Demands: 1946-1954.*

The graph on this page, prepared from and reflecting the various El Paso projects already described, shows the tremendous increase during the postwar period through 1954 of El Paso's certificated pipeline and delivery capacities, during which period El Paso was attempting to keep pace with the constantly increasing and tremendous demands of the market areas it served.



The graph on this page shows, in 1950, that of the total amount of gas El Paso was transporting and selling to its market areas, 75% was residue gas and 25% was dry gas; and that despite the huge increase of total deliveries of gas, El Paso efforts to increase the ratio of dry gas to residue gas produced some results by the end of 1954. (The graph has been prepared from Exh. 2, R. 1229, JA 622.)



Looking to the future, at the close of 1954, the time El Paso first became interested in, and sought to acquire, Pacific Northwest Pipeline Corporation, El Paso was attempting to serve market areas, pursuant to Commission regulation, which would continue to require greater and

greater quantities of gas. If El Paso were to attempt to serve these new consumer demands, it faced a real and continuing problem which had two aspects: first, of maintaining the dry gas-residue gas ratio already achieved; and second, of improving that ratio. That ratio, as the Presiding Examiner said, should be from an optimum operating standpoint, "considerably higher" than an average of 50% dry gas. (JA 1208).

One of the several significant reasons for El Paso's interest in acquiring Pacific, which had access to large gas reserves, primarily dry gas, was to make adequate provision for additional dry gas supplies so that El Paso would not be required "to decline to take any more residue gas". (JA 377).

The Events Leading up to and the Certification of Pacific in 1954

Pacific Northwest Pipeline Corporation was organized in 1949 and was conceived for the purpose of constructing a pipeline to serve the Pacific Northwest area, principally Washington and Oregon, which had no natural gas service. (JA 238, 240, 242, 1167, 1435).

In June of 1950, Pacific filed its first application to serve that area from gas-producing regions of south Texas. (JA 238).

The proposed project thereafter went through various formulations, but its continuing objective was to serve the Pacific Northwest states. In June of 1952, a preliminary agreement was entered into between Pacific and Phillips Petroleum regarding a supply of gas to Pacific from explored but undeveloped acreage owned by Phillips in the San Juan Basin, which had substantial proven reserves. As a result, the project became anchored to the San Juan Basin. (JA 238-42, 251-56, 1167).

The third amendment of Pacific's application was filed in January of 1953 providing for the route initially certificated by the Commission: a line 1466 miles long

running from the San Juan Basin across the Rocky Mountains, through eastern Utah, southwest Wyoming, Idaho and into Oregon and Washington. (JA 240; 13 F.P.C. 221, 228).

When the first hearings were set down by the Commission upon Pacific's application, it consolidated the competing, or "mutually exclusive" applications of Westcoast Transmission Company and Northwest Natural Gas Company, who also were seeking to serve Washington and Oregon, but with Canadian gas. Westcoast was a Canadian pipeline which proposed to bring natural gas from producing regions in northern Alberta and British Columbia to the United States border where it would deliver gas to its United States subsidiary, Westcoast Transmission Company, Inc., which would in turn deliver to customers in Washington and Oregon. Northwest Natural proposed to serve the same markets with Canadian gas from southern Alberta. (JA 117-18; 13 F.P.C. 221, 222-23, 232-33).

The Commission granted the certificate to Pacific and denied the applications of Westcoast and Northwest Natural. (JA 13, 117-18, 253, 369, 1165-66, 1168, 1435; 13 F.P.C. at 237-40).

The Commission found that it was clear "there is a need for natural gas in the areas proposed to be served by all of these applicants". The principal question, said the Commission was "which of these applicants, if any, or what combination of them are able to meet the requirements of the public convenience and necessity". (13 F.P.C. at 226).

The Commission found that:

> ". . . the route of the proposed Pacific pipeline traverses at least three large undeveloped sedimentary basins in the States of Colorado, Utah, and Wyoming. Exploration and development of these production areas would be stimulated by providing an outlet for natural gas. It is for these reasons and others, including the feasibility of the projects

> hereinafter discussed, that we conclude that the applications of Pacific and Colorado Interstate [which would purchase some gas from Pacific] should be granted." (13 F.P.C. at 226; JA 1203-04)

The Commission reviewed the various aspects of the Pacific proposal, including market estimates, types of customers, system capacity, costs of construction, gas supply, financing and earnings estimates. (13 F.P.C. at 227-32).

In this bitterly contested proceeding, many of the more than 50 parties which participated opposed Pacific's certification on various grounds. For example, PG&E and the Southern California Companies opposed the diversion to the Pacific Northwest markets of San Juan gas, which would otherwise be available for California, since the more proximate Canadian gas could be used to serve the Pacific Northwest markets. (13 F.P.C. 1249, 1252).[1]

The economic feasibility of the Pacific project was challenged vigorously in many respects. However, the Commission held:

> ". . . From a review of all the evidence we believe that Pacific's estimates are reasonable and that its project is economically feasible. Under the rates proposed to be charged they can secure the estimated volumes and such rates will produce revenues adequate to cover operating expenses and taxes with sufficient return to insure the necessary financing." (13 F.P.C. at 232)

The Commission found that Westcoast had not demonstrated economic feasibility of its project because of its dependence on making substantial volumes of industrial sales; and that the natural gas rates for this class of customer were a reflection of competitive fuel prices which, if they were to decline, would result in the Westcoast project becoming uneconomic. (13 F.P.C. at 234).

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[1] While El Paso intervened in the proceeding and it did not oppose the Pacific project in the Commission's proceeding relating to the proposed Pacific project El Paso shared the view of its customers. (JA 1192; R. 334)

The thrust of the Commission's decision in denying Westcoast's application was, as the opinion plainly shows, that the Pacific Northwest areas should not be dependent for natural gas service upon supply from a foreign country:

> "The Pacific Northwest is the one remaining large area of this country with a great need for natural gas but which is still without this highly desirable fuel and raw material. It is a section where great industrial expansion has occurred and is still in progress, and one which has played and continues to occupy a very important rôle in the national defense. . . .
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> • • • • •
>
> ". . . Regardless of any long and cherished friendly relations with any neighbor nation able to supply such area with natural gas, it would not be in the public interest to permit the importation of its gas as the sole source for the consumers in need of an uninterruptible supply at a reasonable price, which should always be assured by this commission to the full extent of its powers." (13 F.P.C. at 235; JA 1201-02)

Moreover, with respect to possible use of Canadian gas as a supplementary supply, the Commission stated:

> "In this Pacific Northwestern section of our country there are potential industrial consumers of natural gas whose needs will be great and who may well be supplied with imported gas on a supplementary or interruptible basis. In any area which is receiving from an American source a supply of gas sufficient for its firm needs, it is conceivable that there might be imported to it from a neighbor country upon satisfactory terms and conditions a supplementary supply of gas for its interruptible needs. We do not consider it to be in the public interest, however, to authorize a most important new project to serve a major area—involving a large and important segment of the American economy—which from the outset will be completely tied to and wholly dependent upon an exclusive source of

supply entirely beyond the control of agencies of the United States." (13 F.P.C. at 235-36; see also JA 369, 1167)

In May of 1955, after appeals from the Commission's order had been withdrawn, Pacific's financing arrangements were completed. The construction of Pacific's pipeline, at a then estimated cost of $160 million, started soon thereafter. (JA 254, 1167-68; 13 F.P.C. at 229).

El Paso's First Interest in Access to Canadian Gas Reserves for Supply to Existing and Increasing Demands in the California Markets: The December 11, 1954 Contracts Among El Paso, Pacific and Westcoast

As will be recalled in connection with El Paso's 1953 certificated project to serve its California and Southwestern markets with an additional 400 million cubic feet of gas per day the Commission found that despite the new project, both PG&E and the Southern California Companies, by 1954, would be experiencing deficiencies in meeting their peak day and annual market demands. (12 F.P.C. at 1040, 1042).

When Westcoast's Canadian gas supply, which had been destined for consumption in the Pacific Northwest, became uncommitted by virtue of the Commission's denial of Westcoast's application and the issuance of a certificate to Pacific, the movement of Canadian gas to California "for the first time . . . looked practical. . . ." to the management of El Paso. (JA 141, 277-78, 359).

El Paso's interest in this uncommitted Canadian gas was to provide additional supply to meet the demands of its markets. (JA 14-15, 141, 318, 359, 1168, 1196-97, 1293).

Western Canada, at that time, was beginning to appear as the possible source of larger quantities of gas. While gas had been discovered many years before, substantial exploration did not begin until the late nineteen forties. By 1954, the quantities which had been proven did not ap-

proach the magnitude of any of the major producing regions in the United States, on the basis of discoveries and production, most of which was dry gas. But, eyes were turned to Canada both because of the possibilities of discovery of substantial quantities of gas, and because it and the rugged Rocky Mountain region where exploration had started in the early fifties, constituted the last large areas of promising sedimentary basins on the North American continent which had not yet been intensively explored by wildcatters in search for oil and gas. (JA 17-18, 353-54).

1. *The Problems Pacific and Westcoast Faced in 1954.*

In the months following the issuance of the Commission's order in June of 1954, Pacific, though it had a certificate, could not commence construction of its pipeline to the Pacific Northwest until it arranged its financing. There were a number of obstacles to such financing, including the Westcoast and Trans-Northwest appeals from the Commission's order to the courts. Financing the $160 million pipeline, and therefore the beginning of construction and service to customers, had to await this critical court test. (JA 253-54; Ex. 371, R. 1229, JA 858; Ex. 386, R. 2543, JA 948).

Although it had a supply of Canadian gas available to it, Westcoast had no certificate to bring it to the United States market, which was essential to enable Westcoast to build its pipeline.

Shortly after the Commission's decision in June of 1954, Westcoast tried to interest PG&E in purchasing its Canadian gas. But PG&E turned this proposal down on the ground that the price Westcoast proposed to charge for the gas was too high.[1] (R. 1207-08). Westcoast, therefore, was still a pipeline company without a pipeline.

[1] As events unfold in the years which followed, we shall see the growth of Pacific Gas Transmission Company ("PGT"), a subsidiary of PG&E, into a successful pipeline company, which today is transporting large quantities of Canadian gas to the northern California market. (See pp. 109-111, infra).

Pacific was in no position to buy the Canadian gas which Westcoast could supply and thus in no position to contemplate any new project involving Canadian gas. It was committed under its gas supply contracts to take its principal supply from the San Juan Basin and the Commission had certificated Pacific on the basis of that United States source of supply; it was more than ample to satisfy the estimated market requirements of Pacific's markets. (JA 239-41, 277, 1168).

Although it was a pipeline company with a certificate to serve the Pacific Northwest, Pacific had not obtained the money to build the line which had been certificated. The proposal which was certificated by the Commission in 1954 contemplated at least 75% of debt capital; and whether debt capital or equity capital, financing and investment could not be arranged until the validity of Pacific's certificate had been sustained on judicial review (13 F.P.C. at 230; JA 253-54; Ex. 371, R. 1229; Ex. 386, R. 2543, JA 948).

2. *The December 11, 1954 Agreements—the Proposed Project to Utilize Canadian Gas to Serve California, Which Involved El Paso, Westcoast and Pacific.*

As a result of negotiations between Pacific and Westcoast and between Pacific and El Paso, various agreements were entered into on December 11, 1954, which covered related proposals to be submitted, by the parties, to the Commission.

(a) ***The proposed importation of Canadian gas for delivery to northern California.***

Pacific agreed to purchase 300 million cubic feet of Canadian gas per day from Westcoast to be delivered at the Canadian boundary near Sumas, Washington. Pacific was able to make this commitment because El Paso agreed to purchase from Pacific 250 million cubic feet per day of this Canadian gas, to be delivered to El Paso at a point on the Pacific line near Mountain Home, Idaho. (JA 14, 277-

78, 301, 359, 1168, 1436; Ex. 208, R. 1229, JA 737-62; Item C-3, Schedule 8-L, R. 1238, R. 14425-51).

Also, El Paso, Pacific and Westcoast agreed to cooperate in seeking the necessary authorization from the Commission for the proposed importation of Canadian gas. (Item C-3, Schedule 8-K, R. 1238, R. 14420-24).

Of course, such contracts could only bring the agreed-upon proposals to the Commission for certification under the Natural Gas Act, and, short of such certification, could not effectuate them.

In contracting to buy 250 million cubic feet of Canadian gas from Pacific at Mountain Home, Idaho, El Paso hoped to sell that quantity of gas to its California customers to help meet their new demands. (JA 14-15, 307, 1168-69). More of this shortly.

If authorized and certificated, these agreed-upon proposals would mean that Westcoast would build a 650-mile pipeline from the gas producing regions of northern Alberta and British Columbia, where its gas supply was located, to the International Boundary. (JA 16). This result was contingent upon, first, El Paso securing agreement by its California customers to purchase the volumes of gas involved, and, second, Commission certification of the project, which was itself dependent upon a satisfactory showing of market together with the other factors necessary to show economic feasibility in order to satisfy the requirements of the Natural Gas Act.

Westcoast agreed to dismiss its pending appeal in the Third Circuit which challenged the validity of the Commission's order authorizing the original Pacific project. (JA 1168).

(b) *The El Paso-Pacific plan to exchange San Juan gas and to avoid unnecessary duplication of San Juan gathering facilities.*

Another agreement between El Paso and Pacific was made on December 11, 1954 (R. 1238, R. 14333-38). It pro-

vided first for the development of a plan for the exchange of gas between El Paso and Pacific in the San Juan Basin; and second for a plan to avoid the construction of unnecessary duplicatory gathering facilities in the San Juan Basin. Under the exchange, El Paso would deliver San Juan gas to Pacific during the first five years of Pacific's operation and Pacific would repay El Paso with equivalent deliveries of San Juan gas during the following seven year period. (JA 14, 16, 74, 152-53, 327-329; 532-34; 1170; R. 915-16; Item C-3, Schedule 8-G, R. 1238, R. 14333-38).

This arrangement, which required and which later received Commission certification, permitted Pacific to reduce significantly the immediate and substantial expenditures required of it in drilling in the San Juan Basin and to spread such drilling expenditures over a longer period of time, while still obtaining early deliverability of the gas it needed. Though several other factors caused Pacific's financial position in the succeeding years to become exceedingly difficult, the groundwork laid in the December 11, 1954 contracts averted an even worse financial condition for Pacific. (JA 242-43, 327-29; 14 F.P.C. 157, 163).

When, pursuant to Commission approval, the objectives of the El Paso-Pacific agreement relating to the San Juan Basin later were fulfilled, Pacific was able to defer substantial expenditures for drilling in the San Juan Basin and both Pacific and El Paso were able to realize total savings of several millions of dollars. (JA 16-17, 74, 152-53, 242-43, 276-77, 328-29, 532-34, 1170).

(c) *The meaning to the various parties of the December 11, 1954 agreements.*

The sum of the December 11, 1954 agreements, therefore, was to provide a basis for the submission of projects under which Westcoast would be able to construct

its Canadian pipeline; Pacific could go forward with the financing and construction of its pipeline; and El Paso would be able to approach its customers with an offer to sell new large quantities of gas, to help satisfy the needs of California consumers, which, the Commission had found in 1953, would exceed the supply available to them by 1954.

Accordingly, the President of Pacific sent a somewhat over-optimistic Christmas message to Pacific stockholders on December 22, 1954. It mistakenly anticipated, however, that PG&E would agree to buy from El Paso substantial portions of the gas involved. This sale to PG&E was the first prerequisite to the successful presentation of the proposed project to the Commission. PG&E had not then agreed to purchase the gas and, as will be seen later, it never did; and in fact has since built its own pipeline, through its subsidiary, PGT, which now brings Canadian gas to northern California. (JA 307-08; R. 1524-25).

In his letter of December 22, 1954, "To The Gas Producers, Stockholders And Directors Of Pacific Northwest Pipeline Corporation", the President of Pacific described the details of the various agreements and expressed his opinion as to their consequences:

> "This tri-party deal will benefit all concerned. It will give Westcoast what they have been fighting for—a pipeline. It will mean that Pacific will expand its facilities, be a larger company, will protect its market from future competition by a Canadian pipeline and it caused the dismissal of the law suit of Westcoast against Pacific's present certificate. It means that El Paso's California market will be protected against future competition, and further it results in all parties now working together for a common end rather than fighting each other. Pacific Gas & Electric, in turn, will receive Canadian gas at substantially the same price that they are now receiving gas from Texas and New Mexico.
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> • • • • •

"Pacific will proceed with the financing and construction of its project as presently authorized by its certificate. This tri-party deal will not interfere with our present plans. It is step number two—the expansion of Pacific's project—and must be authorized by FPC. It is hoped within the next sixty days applications can be filed by all parties and a certificate received in the early summer of 1955, which will permit the enlargement of facilities during Pacific's construction period.

* * * * *

"We appreciate the faith and confidence which you have had in us and we believe that the 'treaty' which we have entered into will solve the major problems which have been confronting us.

"We wish all of you a VERY HAPPY HOLIDAY SEASON." (Ex. 371, R. 1229, JA 857-60)

As is evident from the events surrounding Pacific's certification and the December 11, 1954 agreements, to the extent if any that El Paso was engaged in or faced competition in 1954 to transport and deliver Canadian gas to California, Pacific was not an actual or potential competitor of El Paso.

Pacific's President's opinion that the proposed project would among other things, protect El Paso's California market against "future competition" does not accord with the actual facts or any inferences that may be drawn from them. El Paso's participation in the December 11, 1954 proposed project was part of its continuing efforts as a natural gas pipeline effectively to serve its markets under Commission regulation. El Paso was consistently searching for and acquiring substantial new gas supplies to help meet the expanding consumer demand in the areas which it served; to obtain from its distribution utility customers agreements to purchase such gas; and to seek Commission authorization to build and operate the necessary long distance pipeline facilities. Thus, the consistent and success-

ful striving to render public service efficiently and economically and to expand that service, benefits the consuming public.

Further, the unsupported and gratuitous expression of Pacific's President that El Paso would be protected against competition in California, ignored the critical fact that El Paso had not yet sold the project to its California customers. And, it overlooked the fact that even if the project were successfully completed, the existence of that project did not and could not preclude new projects by other companies which might own or acquire a source of supply which could be economically made available to the ever expanding market. For example, the Transwestern Pipeline Company, organized by major oil and gas producing companies, is now serving southern California. (See pp. 111-113, infra). A new pipeline company organized by PG&E, a major customer of El Paso, is now transporting large volumes of Canadian gas to northern California for delivery to its parent, PG&E. (See pp. 109-111, infra). And, since 1960 there has been pending before the Commission a proposal, sponsored by Tennessee Gas Transmission Company, to build a large diameter pipeline from southern Texas through Mexico to southern California for the purpose of delivering large quantities of natural gas to Southern California Edison Company. Edison is an electric utility and the largest customer, on an interruptible basis, of the Southern California Companies.

Up to the time of the December 11, 1954 agreements El Paso had been successful in acquiring needed gas supply for new projects, securing agreement of its customers to purchase the new gas and thereby, together with other factors of economic feasibility, including proposed rates, and laying the foundation for Commission approval of the construction of pipeline facilities which were required by the public interest.

We come now to the events during 1955 which led to the abandonment of the project envisioned by the December 11, 1954 contracts because of El Paso's inability, for the first time, to sell such a proposal to its California customers, in this instance, PG&E.

Despite El Paso's Efforts, Its California Customers Were Unwilling to Purchase Canadian Gas as Part of the Proposed December 11, 1954 Project, and the Applications to the Commission Filed by El Paso and Pacific Had to be Withdrawn During the Summer of 1955.

In May of 1955, applications were filed by Pacific and El Paso with the Commission for certificates authorizing the construction of the project proposed in the December 11, 1954 agreements including: the importation by Pacific of the Canadian gas to be transported by Westcoast through its proposed pipeline from northern Alberta and British Columbia to the International Boundary; the enlargement and extension of Pacific's facilities; and the construction by El Paso of a pipeline extending from Mountain Home, Idaho down to the California-Nevada border, near the Carson City-Reno area. El Paso proposed to sell the gas to PG&E at this point. (JA 307-08, 330-31, 1168-69, Ex. 1, R. 46, JA 564; 14 F.P.C. 157, 158-59, 161).

The proposal contemplated that PG&E would build a pipeline in California westward from the California-Nevada border 150 miles to the San Francisco Bay area. The proposal also contemplated an exchange agreement between PG&E and the Southern California Companies so that the Southern California Companies would get the benefit, by displacement, of one half of the gas delivered at this proposed new connecting link to California near Carson City and Reno. This point was some 450 miles northwest of Topock, Arizona, the most northerly of El Paso's two existing gateways to California. (JA 307-08, 330-31).

PG&E, however, refused to agree to take deliveries at this point near Carson City, Nevada and it would not agree to an exchange of gas which would have permitted the Southern California Companies to realize the benefit of one half of the gas to be supplied from Canada. (JA 307-08, 1168-69; 14 F.P.C. at 161).

El Paso then offered "to take the line off at Pendleton [Oregon] and bring it straight down to Klamath Falls [at the California-Oregon border]". But PG&E likewise objected to that. (JA 308).

It is very interesting that the alternative route suggested by El Paso is the very route through Oregon which PG&E's subsidiary, PGT, followed when it subsequently constructed its pipeline to bring Canadian gas to northern California. The applications for Commission authorization were filed by PGT in 1958 and were certificated by the Commission in 1960. It provides for initial deliveries of more than 400 million cubic feet of Canadian gas per day to PG&E, the parent company. (JA 11, 1169; 24 F.P.C. 134).

PG&E said nothing to El Paso in 1955 about any plans to construct its own pipeline to bring Canadian gas to California. However, in the judgment of El Paso's President at that time, the real cause of PG&E's rejection of the proposed project was that, however "nebulous . . . in their own thinking", PG&E "wanted to bring in their own gas from Canada". (JA 308).

At the outset of hearings before the Commission PG&E stated that it did not desire to participate in the proposed project. (14 F.P.C. at 161). Consequently, El Paso's application to make deliveries at the northern California-Nevada border was abandoned. (JA 1169).

These proceedings ultimately resulted in the issuance of the Commission's order of November 25, 1955 covering various new proposals upon which agreement was reached by the parties involved during the course of the proceedings, and which we now describe. (14 F.P.C. 157).

Following Hearings in the Consolidated Proceedings, the Commission in November 1955 Certificated:

(1) a New Project Covering the Importation of the Canadian Gas and Its Use by Pacific and El Paso;

(2) the San Juan Gas Exchange Agreement and the San Juan Gas Gathering Agreement between El Paso and Pacific; and

(3) a New Major El Paso Project to Expand Service to California, with Residue and Dry Gas Supply from the Permian Basin and the San Juan Basin, Respectively.

1. *Pacific's purchase of Canadian gas from Westcoast was authorized by the Commission.*

After El Paso vigorously but unsuccessfully pursued accomplishment of the December 11, 1954 proposed project, in August of 1955 it entered into new contracts with Pacific, which would enable Pacific, notwithstanding the abandonment of the first project, to carry out its contract with Westcoast to purchase 300 million cubic feet per day of Canadian gas to be delivered at Sumas, Washington at the International Boundary. (JA 15, 301, 322-23, 1169; 14 F.P.C. 157, 160; Item C-3, Schedule 8-M, R. 1238, R. 14452-85-A).

Under the proposals agreed upon, which were submitted to the Commission in applications filed in August of 1955 Pacific would purchase up to 300 million cubic feet of Canadian gas per day from Westcoast. Pacific would sell El Paso 50 million cubic feet of Canadian gas per day, to be delivered on an exchange basis to El Paso near Pacific's processing plant in the San Juan Basin. Pacific also had the right to require El Paso to take another 50 million cubic feet per day at that point. The remaining quantities would be available for sale by Pacific in Wash-

ington and Oregon. (JA 13-16, 301, 1169, 1436; 14 F.P.C. at 159, 162, 163).

When the market estimates which were presented by Pacific to the Commission were not realized in later years, the more proximate Canadian gas supply from Westcoast was used by Pacific to make deliveries in Washington and Oregon, its principal markets; and this, in turn, reduced substantially Pacific's "takes" of gas in the San Juan Basin and the concomitant need to transport the initially forecast substantial quantities of San Juan Basin gas northwestward 1,500 miles to Washington and Oregon. (JA 419; 1200).

As a result, there was substantial idle capacity in important segments of the Pacific line throughout the Rocky Mountain area between the San Juan Basin in southwestern Colorado and Rock Springs, Wyoming. (JA 46-47, 208-09, 419; 1208-09, 1219-1301, Ex. 337, R. 1229, JA 805-06; Ex. 338, R. 1228, JA 809-10).

2. *The San Juan Gas Exchange Agreement was approved by the Commission.*

The second exchange agreement, which was certificated by the Commission in November of 1955, and which provided for the connection of certain El Paso and Pacific facilities in the San Juan Basin, was in substance the originally proposed exchange arrangement under the December 11, 1954 agreement between El Paso and Pacific. El Paso would deliver to Pacific in the San Juan Basin up to 102 million cubic feet of gas per day for three years, up to 60 million cubic feet per day in the fourth year and up to 40 million cubic feet per day in the fifth year. Pacific would return the total of gas received during the first five years from El Paso, starting in the seventh year and at a rate not to exceed 51 million cubic feet per day (JA 14, 327-28, 532, 1170, 1293; 14 F.P.C. at 163, 173, 175).

3. *El Paso's new project to deliver 450 million cubic feet per day to California and the Southwest was also certificated in November of 1955.*

In November 1955, when the Commission certificated the importation of Canadian gas and the exchange agreements, it certificated a major new project proposed by El Paso and to which PG&E and the Southern California Companies agreed. El Paso was authorized to construct new pipeline facilities to deliver at the two existing California gateways, a total of 350 million cubic feet per day to its customers in California; and to deliver a total of 100 million cubic feet per day to other Southwest customers. (JA 314; 14 F.P.C. at 162, 169; R. 2303).

As to California market demands, the Commission found:

> ". . . that the three California companies will have requirements for larger volumes of natural gas at a very early date in excess of the supply from their present California sources and the total gas which El Paso will be delivering to them under its present proposal." (14 F.P.C. at 169)

El Paso relied upon newly acquired gas supplies in the Permian Basin and the San Juan Basin and the 50 million cubic feet per day from the Pacific-El Paso Canadian gas exchange. (14 F.P.C. at 163, 169-70).

The total cost to El Paso of all of the facilities which were certificated by the Commission in November of 1955 was estimated to be $184 million. (14 F.P.C. at 171).

El Paso Conceives the Idea of Unifying and Integrating El Paso and Pacific, to Facilitate Improved and Expanded Gas Service to the Various Markets Served.

El Paso Initiates Negotiations in January of 1955, but They Are Broken Off by Pacific a Month Later Because Unwilling, as El Paso Insisted, That the Transaction be Consummated Only Upon Commission Approval Pursuant to Section 7 of the Natural Gas Act.

Shortly after the agreements of December 11, 1954, El Paso became interested in the possibility of acquiring Pacific and of unifying and integrating the facilities and operations of the two companies. (JA 17-18, 353-54, 1171, 1196-97, 1293; Ex. 411, R. 2727, JA 1006-07).

1. *El Paso saw unification with Pacific, the two systems being complementary to each other, as an important step in meeting continuing problems of finding new large supplies of gas, and in improving the residue gas-dry gas ratio.*

El Paso's thinking concerning possible unification with Pacific was naturally set in terms of the several problems with which it had wrestled for nearly 10 years in its continuous efforts to provide the long distance supply and transmission of natural gas to fulfill the demands of consumers in California and the Southwest. Thus, Mr. Paul Kayser, the President of El Paso, in reviewing the reasons for El Paso's interest in late 1954 and early 1955 in unification of El Paso and Pacific, testified:

> "The principal reason, one of the principal reasons was that, as you can see from this map, [Ex. 1, JA 564] Pacific Northwest represented a direct connection to the potential reserves of Canada. These reserves are among the largest on the North American continent. Certainly the largest remaining reserves from which no great amount of gas has yet been taken." (JA 17)[1]

[1] See also Ex. 411, R. 2727, JA 1006-07.

As Mr. Kayser further testified, a second reason for El Paso's interest was the potential reserves of the Rocky Mountain area:

> "Now, the next potential reserve area in the United States—by potential reserve I mean areas where the gas had not been developed as fully as it has in the other areas of the United States, and that is the Rocky Mountain area. There are good reasons for this.
>
> "One, it is furtherest away from big markets, and two, it is the roughest country in the world to operate in. Consequently, the oil industry and the gas industry have not prospected in that area as much as they have in the balance of the United States.
>
> "Pacific Northwest line leads right up through the prospective area, and consequently furnishes for El Paso an access to those potential reserves." (JA 18)

Mr. Kayser explained why, in El Paso's opinion, the unification would be advantageous to Pacific and its customers:

> "From the standpoint of Pacific Northwest, also Pacific Northwest needed additional markets for their gas, and the putting of these two together as a joint enterprise gave the opportunity to set up a system that, as we regarded it, could most efficiently and effectively and for the longest length of time serve the great markets of the Pacific Coast." (JA 18)

Thus, the complementary character, both in economics and geography, of the two systems, and the access to and the availability of potential new quantities of gas to help meet consumers' demands for such gas, were prime factors of consideration by El Paso. (JA 18, 250, 354). The constant problem of residue gas-dry gas was also a prime stimulus to El Paso's interest in Pacific:

> "One of the reasons that we want to gain access to the reserves of the Inter-Mountain area, that is

> the Rocky Mountain area, it is generally known as, is because that seems to be predominantly a gas area and to have comparatively little oil. . . .
>
> "Now, you get up to Canada and it is predominantly gas. . . .
>
> "Now, our thought is . . . that as the company expands, we want to cut down that ratio [of residue gas to dry gas] for two reasons. One, from an operational standpoint, to be able to be sure to supply the gas when it is needed because, as I explained a while ago, it can happen that your scarcity occurs at the most important and critical time, namely, on cold days. So we are planning both by exploration, purchase of gas in place, and purchase of gas at the mouth of the well, to expand the amount of dry gas that we depend upon so as to reduce the percentage between dry gas and residue gas." (JA 32-33)

El Paso which "had tremendous demands for gas" believed that the unification of El Paso and Pacific "represented the most economic way, the most normal way, suggested geographically and economically to supply those demands". (JA 354).

2. *In early 1955, El Paso initiated negotiations seeking total unification of El Paso and Pacific.*

Accordingly, in early 1955, El Paso began discussions with Pacific concerning the possible unification of the two companies. In February of 1955, El Paso undertook studies of Pacific. Discussions with Pacific continued through March and April. (JA 262-63, 331-33, 1171, 1182, 1293; Ex. 411, R. 2727, JA 1006-07, 1009; Ex. 412, R. 2728, JA 1010; Ex. 413, R. 2729, JA 1013).

Throughout its discussions and negotiations with Pacific, El Paso wanted to effect a complete unification of El Paso and Pacific by merger. (JA 19-20, 263-64, 265-66, 324, 1171, 1182, 1293, 1436). As El Paso's President testified:

> "It was my judgment in the beginning, it was the way we wanted to do it, that the simple way to do it is to join the two properties together physically and operate them as one company—and could best serve the public doing it." (JA 379)

With respect to a possible acquisition by El Paso of Pacific's stock, as compared with a merger of the assets, El Paso believed that there was "a great deal of difference . . . and that . . . the maximum results could be obtained by merger", and was far preferable. El Paso's management thought at that time, however, that common control of the two separate corporations might have worked out "fairly well". (JA 324, 379).

From the outset, and thereafter during the negotiations which occurred in the nearly two years which followed, El Paso was "insisting upon [a proposal for] merging the properties . . ." which would require the Commission's approval under Section 7(c) of the Natural Gas Act. (JA 263-64, 324).

3. *El Paso's proposal would have required a determination by the Commission that it was required by the "public convenience and necessity".*

It was El Paso's view, quite evident as a consequence of its many years of operations, its construction of new certificated projects and the regulation of its rates, that the question of El Paso's acquisition of and control of Pacific and the unification of El Paso and Pacific should be decided by the Commission under the Natural Gas Act, since, as El Paso's President succinctly stated: "The whole public interest is involved in the merger before the Federal Power Commission. . . ." (JA 143).

El Paso, throughout, did not consider that the two pipelines were engaged in any significant competition and that the several positive factors were controlling:

"... well, in the first place, they go north and we go west and south, and we didn't have points of contact except in the one spot in the San Juan Basin. We didn't regard that competition as controlling, and we had from the very beginning, now—let's understand this—from the very beginning, we had become interested in Pacific Northwest in order to be able to get connection with the Canadian gas and such other gas as they might be connected with to jointly put it to California. That is our history, and it is as clear as life." (JA 359)

4. *If there were doubts as to the consequences of the absence of express power in the Commission to require approval of stock acquisitions, submission for Commission approval of the unification of the facilities would make such doubts as to the effects of the stock acquisition wholly academic.*

Pacific refused to submit the proposal for prior Commission approval as El Paso proposed and the negotiations broke down in April of 1955.

To the extent that there was doubt as to the possible antitrust situation resulting from the absence of specific authority of the Commission to regulate the acquisition of control by stock purchase, El Paso's intention to make consummation contingent upon Commission approval, would eliminate such doubt:

"Q. . . . What were your reasons for wanting the merger to be approved by this Commission? A. That was always our desire in making this trade. We wanted to merge the properties, and you will notice that I call there for either a transfer direct or to a subsidiary. Now obviously, if you transfer it to a subsidiary, we could immediately apply to the Commission and transfer it to the company.

"Q. And at the time were you concerned with the possibility of the Justice Department objecting?

A. Well, we wanted to do it that way, irrespective of the Justice Department, but it was perfectly apparent that from the standpoint of avoiding any possibility of trouble that was a better way to do it." (JA 334; 1436)

The negotiations between El Paso and Pacific which had begun in early 1955, broke down in April of 1955 because of Pacific's unwillingness to agree to El Paso's insistent condition that any unification of the two companies be submitted to the Commission pursuant to Section 7(c) of the Natural Gas Act. (JA 249, 264, 332-33, 1171, 1182, 1293, 1436; Ex. 412, R. 2728, JA 1010; Ex. 413, R. 2729, JA 1013).

Pacific "took the firm position that any change of ownership had to be accomplished quickly and decisively". (JA 249). Pacific's position was based upon the then existing belief that a purchase of a controlling interest of the stock of a natural gas pipeline company, although such company was subject to the jurisdiction of the Commission, would not come within the terms of Section 7 of the Natural Gas Act, and, therefore, could be consummated without awaiting Commission proceedings, which doubtlessly would be protracted. (JA 249, 263-64).

Two years later, in 1957, after El Paso had given up hope of persuading Pacific to agree to a merger, and consequently had entered into a stock acquisition plan (more fully described in later sections), the Commission and the Attorney General of the United States also believed that Section 7(c) did not by its terms cover acquisition of control of an interstate pipeline, otherwise subject to the Natural Gas Act, where that control was acquired by stock purchase. This conclusion, of course, was the alleged basis of the action against El Paso and Pacific commenced on July 22, 1957 in which it was alleged that El Paso's acquisition of Pacific's stock violated Section 7 of the Clayton Act and the starting point of the Antitrust Di-

vision's arguments. As counsel for the Antitrust Division stated on October 21, 1957 before the District Court:

> ". . . I would like to refer to an affidavit which the Government has filed in this case on which we quote from an excerpt from a letter which the chairman of the Federal Power Commission wrote to Senator Jackson of the state of Washington this past May. . . .
>
> "'You understand, of course, that the Natural Gas Act does not authorize or require Federal Power Commission approval for security issues by natural-gas companies or for the acquisition of stocks by those companies.
>
> "'If there should be some possible violation of the Sherman Antitrust Act or the Clayton Act, this would be a matter for which the attorney-general is primarily responsible and the files of the Commission are available to him in this connection.'
>
> "So that we have here a situation, Your Honor, where the Power Commission has no jurisdiction at all over the transaction alleged in the complaint, the acquisition of stock." (DCT Oct. 21, 1957, pp. 22-23)[1]

However, recently, on December 13, 1961, the Commission issued an order to show cause addressed to Humble Oil and Refining Company, which had announced plans to acquire stock control of Olin Gas Transmission, "why it should not file an application for a certificate of public convenience and necessity [pursuant to Section 7(c) of the Natural Gas Act] to acquire by stock ownership the facilities of Olin Gas Transmission." In its order to show cause, the Commission set forth the provisions of Section 7(c) of the Natural Gas Act, and cited the decision

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[1] References to Official Transcripts of Hearings held in the District Court are: "DCT [date], p. ."

of the Court of Appeals in the *El Paso-Pacific* merger proceeding.[1]

In any event, back in 1954, both El Paso and Pacific were acting upon the assumption that a stock acquisition did not require Commission approval before consummation. And the break-down of negotiations between El Paso and Pacific, which occurred in April of 1955, was a direct consequence of that impression. As Mr. Fish, the Chairman of Pacific, testified in response to questioning by Mr. Kurtz, Staff counsel:

> "Q. In these earlier discussions, was the question of Federal Power Commission approval ever considered? A. Yes. Mr. Kayser [El Paso's President] from the first discussions in early 1955 made it clear that he wanted to submit the proposed acquisition to the Federal Power Commission for approval."
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> "The Witness: Well, they offered us a proposition where we would agree to a 7(c) proceeding here before the Federal Power Commission, and on that basis that they would give us, let's see—then we would have a stock exchange. What they wanted to do basically was merge it in.
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> • • • • •
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> "The Witness: . . . It was a matter of whether Pacific wanted to go through a 7(c) proceeding and hang the Pacific deal up on a bench until the 7(c) could be obtained, and we at Pacific could not see it, could not agree to it.
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> • • • • •
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> "Mr. Kurtz: And in these negotiations that you had in the spring of '55, El Paso would make you an offer, and you in turn would also make El Paso an offer, would you not?

[1] Even more recently, on January 12, 1962, the Commission issued an order in its Docket No. CP62-110 in which it stated that the proposed acquisition by Southwest Gas Corporation of the stock and facilities of Nevada Natural Gas Pipe Line Company posed the issue, *inter alia*, of whether the proposal "should be granted in the light of the policies and provisions of the antitrust laws of the United States."

"The Witness: We had quite a little bit of horse trading going on at that time, yes, sir.

"Mr. Kurtz: And finally El Paso made the statement they were through?

"The Witness: Yes, sir.

"Mr. Kurtz: And the next day, or at that same time, they decided maybe they better get together again. That is the way it went, isn't it?

"The Witness: It was kind of a see-saw affair. But basically what it hinged on was a 7(c) that we at Pacific would not agree to, and El Paso in turn insisted on a 7(c)." (JA 249, 263-64)

In December of 1955, El Paso Reinitiated Negotiations to Unify El Paso and Pacific. They Broke Down Again, Largely Because of El Paso's Insistence That Commission Approval Pursuant to Section 7 of the Natural Gas Act be Obtained, and Pacific's Continued and Firm Unwillingness to Accede to That Proposal.

In April of 1955, when the El Paso negotiations to merge with Pacific broke down, El Paso, as we have seen earlier, was still attempting to sell to its California customers the December 11, 1954 proposed project.

Thereafter, as has been described, El Paso's December 11, 1954 contract with Pacific relating to purchase of Canadian gas was changed; a new agreement was entered into which enabled Pacific to make firm its purchase contract with Westcoast; new exchange agreements were entered into between El Paso and Pacific; El Paso formulated a new and separate proposal to supply additional Permian Basin and San Juan Basin gas to California and the Southwest markets; and on November 25, 1955 the Commission issued its order in the consolidated proceedings.

By the end of 1955, El Paso was faced with a constantly increasing urgency in acquiring new gas supply and in improving its residue gas—dry gas ratio.

In November of 1955, after the issuance by the Commission of its certificates to El Paso and Pacific, El Paso

again approached Pacific and suggested the unification of the two companies.

El Paso wanted the proposed transaction to be consummated pursuant to Commission approval under Section 7(c) of the Natural Gas Act. Pacific would agree only to a transaction which was quick and decisive. Pacific's Board felt that Pacific would be adversely affected by the uncertainties inherent in a protracted Commission proceeding concerning the sale of its assets, particularly in the light of the fact that it was then in the midst of its construction, was about to undertake additional financing and was attempting to recruit a permanent operating organization. (JA 19-20, 266-67, 1172, 1293).

These differences of view were reflected in the letter of December 14, 1955, from El Paso's President to Pacific's Chairman, which reopened negotiations, and in the minutes of the meeting of Pacific's Board of Directors held February 22, 1956, marking the breakdown of the second attempt by El Paso to achieve a unification of El Paso and Pacific. (JA 264-65, 333-34, 1171-72, 1293).

The President of El Paso wrote the Chairman of Pacific on December 14, 1955, and said:

> "Pursuant to our conference of today we wish to state that we will recommend to our Board of Directors and our stockholders the following as the basis for the merger of the two companies:
>
> "1. A tax free exchange of our common stock for your common stock on the basis of 5 shares of our stock for 9 shares of your stock.
>
> "2. The merger to be accomplished either by direct transfer of your property including your Certificate to the El Paso Company or by such transfer to a subsidiary. We have not developed all of the ideas in this respect but we are sure that the proper method can be found. In all events the merger must be carried out in such fashion as to require the order of the Federal Power Commission under 7-C.

"3. The merger to be approved by the stockholders of both companies." (Ex. 372, R. 1229, JA 861)

The minutes of the Pacific Board of Directors meeting held on February 22, 1956 summarize the discussion and the decision to reject El Paso's proposals:

"Mr. Fish [Chairman] noted that at the last meeting of the Board of Directors the matter of the merger of the Corporation with El Paso Natural Gas Company ('El Paso') on the basis of the exchange of two-thirds (⅔rds) of a share of Common Stock of El Paso for one share of Common Stock of the Corporation had been left open. A full discussion ensued, in which the various advantages and disadvantages of such a merger were discussed. It was pointed out that a full-scale hearing before the Federal Power Commission and a Certificate of Public Convenience and Necessity authorizing the acquisition of the facilities would be required, and that such a hearing might take from six (6) to eight (8) months. Such a hearing would involve an expenditure of large amounts of time and money at a critical period in the Corporation's existence; i.e., during the period it was organizing its personnel and preparing for the commencement of gas sales. It was suggested that preliminary investigation had disclosed that there would be considerable opposition on the part of the Federal Power Commission to such a merger. Opposition had also been indicated from the market areas of California and of the Pacific Northwest. It was felt that the Corporation should not incur opposition from its markets at the present time, when the Corporation is greatly dependent upon their support. There was further discussion indicating a feeling that the suggested ratio of El Paso Shares exchanged for those of the Company was not high enough. The consensus was that the suggestion was not acceptable." (Ex. 386, R. 2543, JA 960-61)

With respect to these negotiations between December of 1955 and February of 1956, as to the action of the

Pacific Board of Directors and the discussion at their February 22, 1956 meeting, the Chairman of Pacific testified:

> "The Witness: Well, I would say straight through on the many offers we had from El Paso, and again always like in this letter right here, of December 14, the whole thing was hung on 7(c), and it was the general opinion of myself and Williams and other officers and directors of the company that we could not afford to risk the animosity of our customer companies by having a 7(c) because until the 7(c) case could be decided by the Federal Power Commission we were tied up on financing, on expansion, on operation, and no one would know where we were going. I mean, it would be one of these indefinite things because on that basis Pacific, we, would still be owning the company, and El Paso would be owning the company, and we would be just status quo. And basically it was that type of discussion that we had at our various Board meetings, that we could not risk jeopardizing, particularly, our market.
>
> "Mr. Kurtz: And that is the opposition that you had reference to?
>
> "The Witness: Yes.
>
> "Mr. Kurtz: Well as far as the market area, but what was the reference to the fact that there might be considerable opposition from the Federal Power Commission? What preliminary investigation was that about?
>
> "The Witness: Well, I did not know that we considered that there would be opposition from the Federal Power Commission. In fact, I was always of the opinion maybe the Federal Power Commission would approve it, that by putting the companies together it might be in the public interest, and much better than operating as two separate lines. That was my own personal opinion." (JA 266-67)

If there be some ambiguity as to Pacific's views of possible success before the Commission, there was no ambiguity as to El Paso's still firm intention to take this pro-

posed unification of El Paso and Pacific to the Commission for a test under Natural Gas Act standards, i.e., whether El Paso's proposed acquisition and operation of Pacific's facilities together with its own as an integrated system were required by the public convenience and necessity (Ex. 372, R. 1229, JA 861).

In May of 1956, El Paso Applied to the Commission for Authority to Deliver an Additional 150 Million Cubic Feet Per Day to California.

The Commission Granted the Certificate Primarily Because of the Exigencies Confronting Consumers in California. However, It Found That After 1958, the Requirements of El Paso's Existing Customers Would Exceed El Paso's Ability to Supply Gas to Them and That a Solution of El Paso's Supply Problem Was Urgently Required.

As we have seen, the growth and the increasing demands in the California and the Southwest markets were of tremendous proportions. Thus, on June 29, 1953, when the Commission certificated deliveries to those markets of an additional 400 million cubic feet of gas per day and in November of 1955, when the Commission certificated an additional 450 million cubic feet per day to those markets, the Commission noted in each instance, that within a brief time the amount of gas being delivered to these markets would not satisfy their increasing demands. (12 F.P.C. at 1037, 1040, 1042; 14 F.P.C. at 162, 169).

The extreme urgency of acquiring new large quantities of gas for delivery to California was emphasized by the Commission in November of 1955 when, despite the new deliveries of 450 million cubic feet per day being authorized, the Commission found that "at a very early date" the demands of California consumers would exceed total supply from sources in California and from out-of-state. (14 F.P.C. at 169).

El Paso responded to this new call and in May of 1956 applied to the Commission for authority to construct and operate new facilities for the delivery of an additional 150 million cubic feet per day to its California utility customers. (16 F.P.C. 1354).

The Commission found that:

> "It is the real and urgent need of ultimate consumers in California which underlies El Paso's proposal and influences our decision herein." (16 F.P.C. at 1355)

However, during the proceedings, which were initiated by the applications filed on May 31, 1956, the Staff of the Commission opposed the issuance of the certificate to El Paso. The Staff contended that within three years, by 1959, El Paso would not have sufficient available gas supply to fulfill all of its system requirements, which by then were approximately 2 billion, 318 million cubic feet of gas to be delivered daily through pipeline facilities which had many years of future physical usefulness, and upon which vast numbers of household consumers were wholly dependent for their continuing fuel needs. (16 F.P.C. at 1356; Item S-2, R. 9560).

The Commission decided that because of the "exigencies" of the consumer situation, it would not to take up El Paso's overall gas supply problem in that proceeding, and would simply inquire into the amount of new gas supply which El Paso had acquired for this new project. (16 F.P.C. at 1356).

The Commission found, however, that after 1958 El Paso would be unable to meet all of the requirements of its present customers. The Commission was fully cognizant of the extreme gravity of the situation and directed El Paso to submit a definite program or solution to meet its gas supply problem, before any new El Paso projects would be certificated:

". . . it [should not be] construed from the issuance of a certificate at this time that we are unmindful of the serious problem facing El Paso with respect to its ability to meet its system requirements. The record conclusively demonstrates that after 1958 the requirements of present customers will exceed El Paso's ability to supply gas to them. This, of course, is of serious concern not only to El Paso but to ultimate consumers in California and elsewhere on the El Paso system. Under the circumstances of this case ['the exigencies of the situation confronting El Paso and consumers in California at the present time'] we do not feel it appropriate to condition this certificate upon a solution of El Paso's overall gas supply problem. However, we shall require in the next certificate proceeding which El Paso has before us, that it present a definite program demonstrating how its future system requirements are to be met and how the ultimate consumers will be protected." (16 F.P.C. at 1357)

The Problem of Trying to Meet the Demands of Southern California Edison, an Electric Utility (and the Principal "Interruptible" Customer of the Southern California Companies), Without Jeopardizing Rates and Service to Household Customers Has Been Continuing Since 1956.

In the context of questioning in this proceeding relating to Pacific's discussions during 1956 with Southern California Edison Company ("Edison"), an electric utility and the principal "interruptible" customer of the Southern California Companies, Mr. Kayser, the President of El Paso, described El Paso's continuing market policies:

"Of course we make it our business to keep in touch with all of our customers, and I do personally with the larger ones such as the California companies, the Phoenix companies, Tucson companies, and the companies serving El Paso, Southern Union Gas Company, and to find out and know what their demands are. And we, of course, are trying to keep

up with the parade and to be prepared to meet those demands.

"We, by our contacts, find out what they need in the future, and the terms and nature of the service.

"Now those terms, the length of service, quantity, time of delivery, load factor, are determined by the market and not by anyone else under the sun. We sell them a block of gas; we do not say we will sell you all the gas you need. We could not do that. They would not make a contract like that. We could not make it if we wanted to. We sell them a block originally—to Southern California Gas Company, we sold a total of 305 million a day.

"Now, to PG&E, we sold 300 million a day. That is all." (JA 128-29).

1. ***Edison has sought a firm rather than an "interruptible" supply of gas.***

Since 1956, Edison has made continuing efforts to have natural gas supplied to it on a firm, rather than on an interruptible basis, for the purpose of generating electricity. Edison's position has been that the use of natural gas on a firm basis in lieu of other fuels would be more efficient and would further alleviate the "smog" problem in Los Angeles. (22 F.P.C. 900, 902).

The position of the Southern California Companies[1] is that the continuation of substantial interruptible sales to Edison is essential (1) to avoid very substantial rate increases to household consumers which would be required if the interruptible revenues were reduced, and (2) to continue expansion of natural gas service to new household consumers.[2]

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[1] See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, and see fn. 23, page 29 therein.

[2] With respect to the types of problems, see *American Louisiana Pipe Line Company, et al.*, 22 F.P.C. 475, 592 (1958), where the Commission refused to certificate firm sales to industrial customers in Chicago:

> "The steel sales are important to the distributors, for such interruptible sales improve the load factors to the benefit of the low load commercial and domestic consumers. It is indicated that loss of the steel sales might require the distributing companies to raise their rates."

Interruptible customers, such as electric utilities and industrial companies, use natural gas in steam generating and other facilities which are capable of using different forms of fuel. Such customers can turn the natural gas valve on or off, depending on whether there is available supply at a particular time; and if the valve goes off, another form of fuel can be supplied immediately.

Thus "interruptible" customers can be supplied during various times of day, or on particular days, when consumers' demands are low—the "valleys"—and then shut off during the highest periods of consumer demands—the "peaks".

By reason of substantial interruptible sales, such as those made by the Southern California Companies to Edison, otherwise idle facilities are utilized and substantial additional revenues produced. The ultimate consequences are two: the domestic consumer pays lower rates than he would have to pay if the distributing utility did not have this additional source of revenue to help meet its cost of service; and the distribution facilities can be best expanded to meet the needs of the household user if, as has been the case, the interruptible sales by the distributing utility of natural gas increase.

These matters relating to interruptible sales to Edison had important meaning to El Paso during 1956, as we shall see in the following section.

2. ***In early 1956 Edison, for the first time, approached El Paso rather than the Southern California Companies from which it had purchased "interruptible" supply for ten years.***

Prior to 1956, El Paso had no dealings with Edison. El Paso's dealings in California were with the three distribution utilities: the two Southern California Companies and PG&E. (JA 124-125).

In February of 1956, Mr. Kayser, President of El Paso, received a call from an Edison executive, who inquired if

El Paso were interested in selling gas to Edison. This call, and the events which followed, were described by Mr. Kayser in his testimony:

> "I received a call from a representative of the Southern California Edison inquiring if we would be interested in selling them gas. I was courteous and considerate of his request and told him that we would talk about it, but I at the same time told him that the Southern California companies were our customers and that we did not have any lines in California and we only came to the California border, that it had been our policy up to that date, but I would investigate and see what we could do.
>
> "Well, the net of it was that we discussed it after that many times with the California companies, and we became satisfied that because of the smog situation in Southern California that there was a real problem being created in respect to the gas supply. There was a difference of opinion between the Southern companies and Southern California Edison in respect to the critical situation created by the smog.
>
> "I gave a lot of study to it and I became convinced that something should be done about that demand. I took it up and talked to the California companies in the early part of '56, as a matter of fact as early as February, and we made up our minds that while it was a problem that ought to be worked out on a cooperative basis between ourself, the Southern California companies and Southern California Edison, nevertheless it ought to be worked out.
>
> "So we worked at it. Actually I believe it was in August that we had a definite conference with the Southern California Gas Company people and they agreed that we ought to try to solve that problem then and that it might be helpful for me to go and talk to the Southern California Edison people, and I did so." (JA 124-25)

During the Spring of 1956, as part of its continuing program to acquire new large reserves for its markets, El Paso sought to acquire the CATCO gas in the Louisiana

Gulf Coast area for transmission to California. The CATCO gas was viewed as a possible means to satisfy Edison's need and to satisfy other large market needs of the Southern California Companies. However, Tennessee Gas Transmission Company outbid El Paso on the CATCO gas, as this Court knows[1] and this particular El Paso solution for the Edison problem accordingly collapsed. (JA 308-09).

While originally, Edison was talking to El Paso about the possibility of purchasing 200 million, 250 or 300 million cubic feet per day, that number was reduced to 150, and then down to 100 million cubic feet per day. (JA 127-28). This was one critical fact, among many, in the story of Pacific's discussions with Edison from May until October of 1956.

3. *In May of 1956, Pacific started discussions with Edison.*

Aware of its need to sell additional quantities of gas in view of lower market demands than originally estimated and its contractual obligations to purchase Canadian gas and San Juan gas, Pacific started to look for potential gas purchasers early in 1956:

> "In early 1956 during the construction of the line I [Ray Fish, Chairman of Pacific] explored the possibility of Pacific Northwest bringing gas eastward to the Chicago market and discussed this matter with Peoples Gas and Coke Company. Ultimately this project took the form of [a proposed] additional sale to Colorado Interstate at Rock Springs for resale to Natural Gas Pipeline of America for delivery in the Chicago area. In this connection, in April 1956 we filed our application in the so-called Beatrice Project for this sale of 100 million cubic feet to Colorado Interstate.
>
> "Q. Why did you not attempt to have Pacific Northwest Pipeline Corporation itself take the gas

[1] *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378.

> to Chicago? A. Colorado Interstate was already interconnected with both Pacific [at Rock Springs] and Natural Gas Pipeline Company, and to avoid duplication of facilities and in order to render the greatest amount of additional service at the lowest cost, a three-way project involving Pacific, Colorado Interstate and Natural was worked out." (JA 243)

These applications, which for Pacific simply involved the sale of gas without new facilities, were later withdrawn, because of several problems unrelated to Pacific's participation.

In May of 1956, Pacific learned that Edison was having difficulty in obtaining the gas it desired on a firm, rather than on an interruptible, basis from the Southern California Companies and Pacific thereupon approached Edison and inquired whether Edison was interested in obtaining its supply directly from Pacific. Pacific then entered into exploratory discussions with Edison. (JA 243-44, 1186).

4. ***The prerequisites to any Pacific-Edison proposal were the participation of PG&E and the Southern California Companies. However, they were not interested. In September of 1956, Edison discontinued further discussions with Pacific.***

In his initial discussions, Mr. Fish of Pacific was informed by Edison that its needs were in the range of 300 million cubic feet per day. But, later Edison made it quite clear that "it alone could not possibly absorb that quantity." Both Pacific and Edison recognized that the essential prerequisite of any project of Pacific to supply Edison was the participation of the distribution companies supplying northern and southern California, for three reasons: (1) that the amount of gas Edison could take was not sufficient to support the construction of a new pipeline; (2) that the "regulatory Commissions would be more favorably inclined to the project [with] . . . the participation of the distribution companies"; and (3) since the idea envisioned

a line from Canada, the participation of PG&E was essential because the only new pipeline which could possibly be economic was one running from Canada to northern California with "gas exchanges and back offs" between PG&E and the Southern California Companies, utilizing the pipeline facilities of PG&E which run from northern California to southern California at the Arizona border. (JA 244-45, 261-62, 278-79, 1186).

Pacific did not approach PG&E or the Southern California Companies concerning this matter. (JA 245).

Prior to Edison's discussions with these California gas distribution companies, and on July 30, 1956, Pacific and Edison entered into a "preliminary letter agreement", which "really was not a contract . . . [but] perhaps a letter of intent, or something of that sort" (JA 279, 457, 1186) providing for a proposed sale of 300 million cubic feet of Canadian gas (JA 245-46, 457):

> "Q. Would you state briefly the terms of the July 30 agreement? A. Actually, we signed three agreements on that date. First, the basic sales agreement provided for a sale by us to Edison of 300 million cubic feet per day on the Oregon-California border beginning November 1, 1959. In a separate agreement we stated the conditions under which the understanding in the first letter could be terminated. These conditions were that Edison could terminate prior to December 31, 1956, if it concluded that the proposal was not economically feasible, and that Pacific Northwest could terminate prior to that date in event it could not acquire access to the reserves needed to support the proposal.
>
> "The third agreement required mutual consent for any publicity releases." (JA 245-46)

As is evident from this description of the side agreement for which no publicity would be given except by mutual consent, the "preliminary letter agreement" or "letter of intent" was intended simply and hopefully as

a selling device. Edison and Pacific "hoped that this agreement would serve to induce either PG&E or the Southern California Gas companies, or both, to participate" in the proposal. (JA 245).

In early August, shortly after these letters were signed, Edison raised the matter with both PG&E and the Southern California Companies. PG&E, which had never considered Pacific a financially sound company, rejected Edison's suggestions immediately. The Southern California Companies also promptly rejected Edison's suggestion. (JA 247, 469-70).

There were other serious questions with respect to economic feasibility of a Pacific-Edison pipeline, including price of gas and cost of construction. The President of Pacific, Mr. Silloway, didn't think the proposal being discussed with Edison was economically feasible. He believed that Pacific had no chance to carry out the ideas being explored; and he never regarded the discussions which had occurred as serious. (JA 446-47, 457-61, 1186).

Before the end of September, 1956, Edison informed Pacific that they were terminating the July 30 "agreement"; Pacific wanted to approach PG&E without informing PG&E of such termination, but Edison advised Pacific that the matter was "clearly over and done with". (JA 247, 458-59).

5. *El Paso in 1956 did not believe that it was in the public interest to supply Edison directly, no matter which pipeline might provide the supply, and thereby by-pass the distribution utilities, the Southern California Companies.*

In August and September, having learned of the conversations between Pacific and Edison (JA 126), El Paso was not interested in talking seriously with Edison about the solution of its problem unless, as Mr. Kayser put it, it was "free to trade" (JA 400-01). Edison, apparently

after the flat rejections it had received from PG&E and the Southern California Companies, indicated that it was. (JA 126, 247, 400-01).

Mr. Kayser, President of El Paso, was cross-examined by Mr. Bennett, counsel for petitioner, on his discussion with Mr. Quinton of Edison, the role of Pacific and the problems of a direct sale to Edison:

> "Q. Mr. Kayser, you did express some concern about Pacific's possible entry into the California market, didn't you, to Mr. Quinton [of Edison]? A. I did not express it that way, Mr. Bennett. I expressed always to Mr. Quinton, without any sort of questions, so far as I am concerned, that I was deeply concerned about a split between him and his supplier, the Southern California Gas Company. And I told him that that was a serious thing, and that any breaking off on his part would be a disrupting thing, and that I wanted to do my best to try to avoid that disruption.
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> • • • • •
>
> "Q. Would you tell us now why it was against the public interest for the Southern California Edison Company to make a contract with the Pacific Northwest system to bring more gas into California? A. Because if you study the history of the utility regulation, utility service, you will find that there is a well-established principle in respect to gas, and it has somewhat the same connotations in respect to electricity, but certainly as to gas, that the large users who have a choice of fuel should be attached by the distributor, and the price that they should sell the commodity to that large user who has a choice—some of the decisions go so far as to say the price should be all the traffic will bear so as to come up even with the cost of the other fuel, giving a little incentive for it. But I do not quite go that far. But I do go this far, that if you strip the big users from any distribution company, and I do not care where it is, you will raise the price to the domestic user, and the commercial user. And on that basis, I consider it to be against the public interest, and against

our own specific financial interests, because when you take those customers away from our company, I mean, our distributor, our distributor will be unable to take his fuel allotment of gas from us.

* * * * *

"Q. Now which situation are you talking about, when El Paso sells the gas— A. It does not make any difference who sells it, El Paso, Pacific Northwest, Pacific Gas & Electric Company, Trans-Western Pipeline Corporation. Whoever sells it to the distributor, giving the distributor the opportunity to make that profit and keep his big customers, as he should, that is the maximum to the public interest." (JA 401-06)

6. *El Paso attempted to compose the situation with an arrangement satisfactory to all involved. However, the proposal was rejected by the Commission on the ground, among others, that Edison would receive an undue preference over other consumers in southern California.*

After considerable discussion and negotiation, and after Edison had rejected the Pacific proposal, El Paso was able to work out an arrangement with both Edison and the Southern California Companies, in an attempt to solve the problems involved, including Edison's desire for firm gas. (JA 129, 247, 404).

Insofar as El Paso was concerned, the arrangement was an effort by it "to compose a situation that, because of many personal elements that had entered into it . . . was getting into a bad business situation." (R. 1619, 1653).

The contract provided that El Paso would deliver the gas to the Southern California Companies which would utilize their own facilities for transporting the gas within California to the Edison Company and avoid duplication of facilities and enable the distribution companies to realize the "profit of that transportation". Further, the contract gave the Southern California Companies the right

to buy the gas for use in serving household demands during the winter heating season. (R. 1619, 1651).

The proposed arrangement was submitted to the Commission, but in 1959 it denied the applications as filed, and instead issued a certificate authorizing the transportation and sale of an additional 100 million cubic feet per day by El Paso to the Southern California Companies, for distribution by such companies to all their customers. The Commission concluded that it would not be in the public interest to have a substantial portion of El Paso's reserves committed to one consumer over a relatively long period of time. The Commission also held that the very nature of Edison's application indicated "an attempt by Edison to obtain preferential treatment over other users and would-be users of gas in a critical area, Southern California." (JA 1199; 22 F.P.C. 900, 23 F.P.C. 213).

Edison continues to seek a firm supply of gas. Now pending before the Federal Power Commission and the California Public Utilities Commission are proposals involving subsidiaries of Tennessee Gas Transmission Company to transport a firm gas supply from South Texas, via Mexico to Edison in Los Angeles.

As a Result of Negotiations Which Were Started in August of 1956, El Paso and Pacific Agreed, in October of 1956, to a Stock Exchange Plan.

Negotiations between El Paso and Pacific, which had been broken off for the second time in February of 1956, were resumed again in late August of 1956 and ultimately led to El Paso's acquisition of stock control of Pacific.

1. *By August of 1956, El Paso's problems had become even more urgent.*

El Paso persisted in its idea that unification with Pacific would help meet the continuing and urgent problems of El Paso and its customers by making available sufficient gas

supply to fulfill consumer demands on a continuing and dependable basis. (JA 1172, 1196-97, 1293).

In particular, El Paso, which had filed an application in May of 1956 to supply an additional 150 million cubic feet to the California market, was being faced by opposition from the Staff of the Commission, which contended, as the Commission was to find, that El Paso did not have sufficient gas reserves to meet all of its system requirements after the year 1958. (16 F.P.C. at 1354, 1356). It must be recalled that by this time, mid-1956, El Paso's daily requirements were approximately 2 billion, 318 million cubic feet per day (Item S-2, R. 1138, R. 9560); and the depreciated cost of El Paso's installed system facilities was more than $1 billion, with years of physical life ahead so long as sufficient gas supply was available, which necessitated, at minimum, the continuous acquisition of new gas supplies equivalent to the tremendous volumes of daily deliveries.[1]

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[1] El Paso's problem of constantly acquiring large new reserves was enormous, no matter how skillful and energetic its management. As pointed out by a Presiding Examiner in the *Edison* decision rendered in May of 1959, (22 F.P.C. 906, 951-52):

> "El Paso as a matter of business necessity must obtain well over a trillion cubic feet of deliverable gas per annum just to stand still, i.e., to maintain the present balance of reserves relative to requirements. The acquisition of these enormous quantities of gas to 'stand still' is an undertaking requiring great skill and industry, qualities which the management of El Paso has demonstrated that it possesses.
>
> ". . . To improve materially the present relationship between supply and requirements, it would be necessary for El Paso to acquire well over a trillion cubic feet per annum even if it did not obtain any additional authorizations from the Commission to sell more gas.
>
> "As the recent history of this industry conclusively demonstrates it is not easy for any pipeline to obtain substantial new supply unless it is willing to outbid all other companies seeking to obtain the additional gas. In this connection, not only is the initial price an element in the negotiation for the acquisition of natural gas but in such negotiations other elements must be taken into consideration, such as 'take or pay for' clauses, delivery conditions, rate of takes, pressure, facilities, problems of re-pressuring and re-injection of gas. . . ."

In the same case, the Commission said:

> ". . . Additional gas is becoming increasingly difficult and more expensive to obtain because of the many purchasers competing for the available gas. It takes great diligence and skill simply to obtain enough new gas supplies to maintain the present minimum balance for El Paso's extensive system." (22 F.P.C. 900, 903 (1959))

The unification of El Paso and Pacific was, therefore, a matter of even more intensive urgency to El Paso in the fall of 1956.

2. *In August of 1956, Pacific faced numerous problems and difficulties.*

At the same time, acquisition of Pacific (though small in size, cost, and market obligations relative to El Paso) was viewed by El Paso's management as the most significant step toward the solution of the critical problems affecting El Paso and its consumers because of Pacific's access to the great potential gas reserves, primarily dry gas, in the Rocky Mountain area and Canada. (JA 17-19, 303-04, 1172-73, 1196-97, 1293).

Pacific had developed many critical problems of its own which unification with El Paso could resolve. By August of 1956, substantial portions of the Pacific line had been constructed and commencement of regular deliveries appeared to be only four or five months away. However, by this time, Pacific was in an extremely difficult position financially and its prospective financial position looked even less promising. The hard facts were that the various estimates submitted to the Commission by Pacific prior to its certification were incapable of fulfillment; or, as in the case of market development, such estimates could only be realized in the more distant future. (JA 51, 54, 448-51, 460, 1210-12).

Since the Pacific project involved service of natural gas to a large area for the first time, it was essential that the local distribution companies aggressively and energetically help develop the market for natural gas.

Such a new local distribution company faced a number of problems. First, it had to conduct the difficult educational task of convincing consumers, who had no experience with natural gas, of its usefulness and safety. Second, it had to persuade householders and industries to change over

from the fuels they were using, which would involve the installation of new equipment and substantial change-over expense. Third, the question of price was and is particularly important in the Pacific Northwest area because of the keen competitiveness of fuel oil prices and hydroelectric energy. Fourth, the local companies required substantial amounts of money in the initial development period, prior to and during the first few years of service, for which they would not receive reimbursement as part of their cost of service until later years. (JA 116-17, 158-60, 163-64, 166-67, 210-14, 456, 465, 505, 1210-12).

Since market development required greater sums than most local distribution companies in the Pacific Northwest area were capable of providing, and since the extent to which such distribution companies were able to develop the market directly affected Pacific, the need existed for Pacific to support the program of local market development with large sums of money. (JA 159-61, 214-15, 1210-12).

But, Pacific was not in a financial position to make such expenditures. (JA 214-15, 1212). The cost of construction of its pipelines pursuant to its 1954 and 1955 certificates, estimated at the time of certification to total $181 million, in fact, exceeded $225 million. (JA 1168). Despite the mitigating effects of gathering and exchange arrangements between El Paso and Pacific in the San Juan Basin, under its gas supply contracts Pacific was required to drill a number of wells in the San Juan Basin and such costs of drilling and development were financially burdensome to Pacific. (JA 51, 214-15, 1168, 1210-12).

The immediate consequence of Pacific's inability to provide the financial stimulus for market development was a 50 million cubic feet per day deficiency in its estimated gas sales which, in 1957, produced $3 million *less* in revenues than had been anticipated. (JA 53, 1211).

By 1956 it had also become apparent that revenues from natural gas liquids—valuable by-products extracted after

production and before transmission—would be substantially less than initially forecast. These anticipated and estimated "non-jurisdictional" revenues played an important part in the Commission's initial determination of the economic feasibility of Pacific's project. (JA 53, 1211; 13 F.P.C. at 231).

The two significant factors relating to natural gas liquids, of which Pacific became aware by 1956, was that the price for these liquids would be 3¢ per gallon rather than 4¼¢ per gallon, which was assumed in the original estimates; and that the recovery of liquids from the gas processed in Pacific's San Juan plant would be about one-half of the recovery which had been initially estimated. (JA 53-54, 448-49).

The net result of these factors was that in 1957, its first year of operations, Pacific's revenues from the sales of liquids were $3,400,000 *less* than had been forecast. (JA 53, 1211).

As a consequence of the slow and disappointing market development, which in part was due to Pacific's inability to provide the necessary and substantial financial support for distribution companies, it was apparent that the market structure, in terms of classes of customers, at the outset of Pacific's operations was going to be substantially different than forecast before the Commission in 1954. (JA 52-53, 234).

At the outset of Pacific's operations, the preponderance of Pacific's sales would be in two classes, to interruptible customers and to other pipeline companies, "both of which classifications of service produce lower unit prices than do the sales for resale to distribution companies." (JA 52).

And it will be recalled, one ground upon which the Commission had denied Westcoast's application in 1954 was that the Westcoast market estimates, as compared with Pacific's, had included a much larger proportion of sales to interruptible customers. The Commission found that such interruptible sales reflected rates and revenues based

upon highly competitive fuel oil prices and, that if the latter were to decline, the Westcoast project would become uneconomic. (13 F.P.C. at 234-35).

In such circumstances, the fact that Pacific was able to sell substantial quantities of gas (relative to its total sales) to other pipeline companies was beneficial because such pipeline sales produced income for Pacific at a time when its income from sales to distribution companies was extremely low. The rates charged for such sales to Mountain Fuel Company and Colorado Interstate during 1957 and 1958, did produce a rate of return for Pacific. Petitioner, however, complains that Pacific was not receiving its "full cost of service" on these sales and therefore Pacific was undercharging these customers. But, the facts were that rather than being "undercharges" the rates involved were all those customers were willing to pay for the gas; and those rates produced some return for Pacific, though not a maximum allowable rate of return. Of course, to the extent that Pacific could increase its rates to these other pipelines, the consumers served by such pipelines would have to bear the increased cost. (JA 455-56, 503-04).

3. ***The sum of the situation in August 1956 was that Pacific could play a major role in helping solve El Paso's continuing and urgent gas supply situation; and El Paso could aid Pacific in solving its problems.***

The sum of the situation which existed in August of 1956 when negotiations were resumed between El Paso and Pacific was that Pacific was a pipeline with underdeveloped markets and serious financial problems; and an overabundance of potential supply by reason of its direct connection to the large new reserves of the Rocky Mountain region and Canada, which it then could not use; whereas, El Paso, a financially strong supplier, was in urgent need of gaining access to large new reserves in order, first, to be in a position to fulfill its existing sys-

tem requirements during the long life of its already installed and extensive pipeline facilities throughout the Southwest and California; second, to acquire access to new and large dry gas reserves in order to reduce the residue-dry gas ratio; and third, to gain access to large new reserves in order to be in a position to help meet the still increasing and tremendous demands of the consumer markets which it supplied.

4. *El Paso persisted in its desire to take the proposed unification to the Commission. Pacific was unwilling.*

El Paso resumed negotiations with Pacific in late August of 1956. El Paso was still determined to bring the proposed unification of El Paso and Pacific to the Commission for a determination, pursuant to Section 7 of the Natural Gas Act, whether such unification was required by the public convenience and necessity. (JA 19, 64, 85, 248-49, 1172, 1182).

But, Pacific's officials continued to be adamant in their refusal to enter into a transaction whose consummation would be contingent upon Commission approval after a protracted hearing. (JA 19-20, 64-66, 85, 249, 1172, 1182, 1293). Mr. Silloway, President of Pacific, explained the reasons for that position and described certain of the events which occurred during the negotiations of August to October, 1956 (JA 64-66):

> "Q. Will you please state why Pacific insisted upon a stock acquisition rather than upon a merger with El Paso as the form in which the transaction had to be cast? A. Well, commencing about in August of 1956, and continuing through September and October of that same year, Mr. Kayser, the president of El Paso, explored the possibility of El Paso's acquisition of Pacific with other members of the Board of Directors of Pacific and with me. We understood that this could be achieved by casting the acquisition either in the form of an exchange of 80 per cent or more of Pacific's outstanding stock

solely for El Paso voting stock, or in the form of an acquisition of the actual physical assets of Pacific by merging with El Paso. The latter course required the prior approval of the F.P.C. And this meant that after an acceptable offer was received from El Paso, but before it could be implemented, Pacific would have to file an application with the Power Commission, participate in a hearing of indeterminable length, and await the decision of the F.P.C. as to whether the transaction could in fact be consummated.

"Now such a procedure was completely unacceptable to Pacific's management and directors. We felt at that time that the responsibility for managing the affairs of the company could not be suspended and placed in doubt during a crucial period in Pacific's affairs.

"As of October 1, 1956, as I am sure you all know, Pacific had filed a number of applications which were then pending before the F.P.C. Some of these were applications for permission to make the sale of additional volumes of gas, and some were applications for authorization to construct facilities to connect additional supplies.

"We had at that time developed a capital budget for 1957 requiring approximately $50 million of additional funds to construct facilities which had already been authorized by the Commission and to retire bank loans. At least fifteen million of this amount we had concluded had to be provided by additional equity in the form of common or preferred stock. And Pacific had formulated plans to raise that amount of equity funds by the sale to the public of stock and to provide the remainder of the capital required for this program by the sale of additional first mortgage bonds and by bank borrowings.

"The headquarters office of Pacific was just at that time being moved from Houston, Texas, to Salt Lake, so that the line, not yet completed, could be operated from the latter city. We were in the process of recruiting and training operating personnel, and some personnel that we already had had been moved

to Salt Lake City, and others were in the process of giving up their homes in Texas and elsewhere and moving to Salt Lake City. And we felt that at this particular stage of Pacific's career, to consider embarking upon a course of action which would leave the ownership and direction of the corporation in doubt and subject it to the outcome of protracted proceedings before the Power Commission, was just entirely imprudent. That was the conclusion we came to at that time. And it was, and it is my judgment that under those conditions the additional first mortgage bonds that we had to sell could not have been sold, and the public offering of equity securities which we were at that time preparing was just completely not feasible. And the recruiting of competent personnel would have been rendered extremely difficult, if not practically impossible. We felt that the morale of Pacific's own employees would have been impaired. So in the light of these circumstances, the obligations of Pacific under its certificates of public convenience and necessity to perform within fixed periods the projects which were authorized by the F.P.C., might well have been impossible of accomplishment.

"All things considered the exchange of El Paso's stock for Pacific stock offered the only method for El Paso to acquire Pacific which was then acceptable to Pacific's management and directors.

"And Mr. Kayser was informed of this attitude of Pacific in the course of these negotiations."

5. ***El Paso finally decided in October and November of 1956 to acquire control of Pacific by the only method possible, which was by stock acquisition.***

In the face of this firm position by Pacific and the extreme urgency of its own needs and problems, El Paso finally acquiesced and agreed to Pacific's plan of a stock acquisition.

On October 8, 1956, a letter of intent was signed, and on November 8, 1956, a formal agreement was executed between the directors of El Paso and the directors of

Pacific. Under this agreement, El Paso would offer to all Pacific stockholders the opportunity to exchange Pacific stock for El Paso stock, such offer being contingent upon acceptance by more than 80% of Pacific's stockholders. Concurrently with the execution of the November 8, 1956 agreement, El Paso made a $15 million cash loan to Pacific.[1] (JA 19, 66-67, 85-86, 107, 110, 248, 1172, 1182, 1293, 1493, 1174; Ex. 2, R. 1229, JA 565-652; Item W-2, R. 1138, R. 10040).

The exchange ratio reflected the market values involved and did not affect, in any way, Pacific's rate base, which was and is based on original cost. (JA 102-04).

Pacific insisted that El Paso represent that it had no present intention to merge the two companies so that Pacific's stockholders could make such a representation in an application for a tax ruling, and could be assured that the exchange would be tax-free (JA 249-50, 1172, 1182).

In its prospectus of January 8, 1957 filed with the Securities and Exchange Commission, El Paso stated (JA 494, 1127):

> " 'It is expected that Pacific will be operated as a subsidiary of the company, and the management of the company has no present intention of merging Pacific into the company or having the company acquire Pacific assets. The reasons for this are that, (a) the agreement includes a representation to the effect; (b) the ruling of the Internal Revenue Service referred to above was made upon such representation; and (c), a merger or acquisition of assets would necessitate the refunding, at least, of a substantial part of Pacific's outstanding debt, which in the light of the present interest rates, could be done only at higher rates.' "

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[1] Later El Paso purchased stock of Westcoast owned by Pacific (with a buy-back arrangement for Pacific), so that Pacific could meet its preferred stock dividend requirements. (JA 40-41, 155)

El Paso had to accept what it considered a second-best solution, but in any event, a solution which was preferable to none at all. As the Commission held, the record shows that the primary purpose of the acquisition [by El Paso] was to gain access to the vast and relatively untouched Canadian gas reserves for El Paso's markets, and to gain access to the reserves of the Rocky Mountain area". (JA 1293).

During the period from October 1956 through January 1957, El Paso's management believed that it might be possible to produce effective results to help meet its needs and problems if El Paso and Pacific were operated as separate though commonly controlled companies. When El Paso's offer became effective in January of 1957, after more than 80% of Pacific's stockholders had accepted the offer, El Paso's management set out to operate the companies in this manner; but, it soon became apparent that complete unification was the only method by which the companies could be operated so as to help solve their respective problems. (JA 21; 67, 100-01, 1172, 1182, 1293, see pp. 84-86 infra).

In the Fall of 1956, El Paso consulted its financial advisers to determine if the proposed stock acquisition could be effected from a financial standpoint. Aware of the possibility of an antitrust question arising from the absence of express Commission power to regulate or certificate a stock acquisition, El Paso also consulted counsel. (JA 18-19).

The question put to counsel was in terms of the proposed transaction, namely a stock acquisition and no present intention to merge the two companies. Thus, the opinion of Sullivan & Cromwell, which was summarized in El Paso's proxy statement and prospectus, was predicated on the understanding that the Commission would not pass directly on the question of El Paso's acquisition of control of Pacific:

> "Messrs. Sullivan & Cromwell have rendered an opinion to the Company with respect to the applica-

tion of the anti-trust laws to the proposed acquisition by the Company of 80% or more of the Common Stock of Pacific of which the following is a summary: The opinion first summarizes the operations of the Company and Pacific and states it to be counsel's understanding that the purpose of the proposed transaction is to bring about the most effective and economic supply structure for servicing the needs of natural gas consumers. After reviewing possible problem areas, the extensive regulation by the Federal Power Commission of the activities of and rates charged by both companies, the fact that statutory immunity from Section 7 of the Clayton Act is not available, and the importance of the conservationist effects of the transaction, the opinion notes that the antitrust questions raised have no controlling precedent and are original, significant and difficult ones, which may require extensive hearings, proceedings and examination and cross-examination of witnesses and experts to resolve. Counsel concludes that while the matter is not entirely free from doubt, it is their opinion that the proposed transaction is not in violation of the anti-trust laws presently in effect as so far construed by the courts. The opinion states that it is rendered on the assumption that after full investigation, the purpose of the transaction would continue to prove to be as previously indicated, and that it is qualified by the fact that problems under Section 7 cannot be evaluated definitively because of the paucity of judicial decisions interpreting the statute." (Ex. 3, R. 1229, JA 657).

In this same connection, El Paso's counsel undertook to discuss the proposed transaction with the Attorney General of the United States.[1] As a result of these discussions in November of 1956, El Paso supplied a substantial amount of information to the Department of Justice, concerning the

[1] Contrary to assertions in petitioner's brief (p. 20) El Paso's counsel did not meet with the Federal Power Commission; and there is nothing in the record which suggests that he did.

proposed transaction, the purpose of the transaction and the prior operations of the two companies. (DCT Oct. 21, 1957, p. 41).

As late as February, 1957, which was after El Paso had acquired more than 80% of Pacific's stock, the Antitrust Division advised El Paso's counsel that it had not reached a final decision in the matter and was still investigating it. (DCT Oct. 21, 1957, p. 49).

By May of 1957, El Paso had acquired more than 99% of Pacific's stock. (JA 67, 86-87, 1172, 1182, 1293, 1437).

Though El Paso Set Out to Operate Pacific as a Separate Company, It Soon Became Apparent in the Practical Context of Trying to Effect Such Operation, That Complete Unification Was by Far the Most Effective Possible Method.

On direct examination the President of El Paso testified:

> "In the initial acquisition we handled the matter as a separate corporation, made our plans on that basis, and set it up on that basis because that was the only one that we could — the only way we could acquire the stock.
>
> "However, early in the operation of the properties as a subsidiary, it became apparant that you could more efficiently operate them if we could integrate them together. There were so many points of contact that it became apparent to us that it would be more — that we could more efficiently operate the properties by putting them together." (JA 21).

He was cross examined by petitioner's counsel on this subject:

> "Q. Now, when did it become apparent in your operation of the properties of Pacific as a subsidiary, that the two systems could be more efficiently operated by integrating them? A. I believe I have

already testified that that began to be apparent to us within a matter of months after we acquired it and became responsible for its operation.

"Q. Would that be two months after the stock exchange and acquisition date? A. At least.

"I mean, within those two months, it became apparent to me that there were more problems in relation to trying to keep it a separate corporation than I had previously anticipated.

• • • • •

"Q. Well, now, operating through a subsidiary can be an efficient operation. Hasn't that been your experience?

"A. Yes, where you simply consider the corporate entity as a form.

"Wherever you try to preserve discretion and independent financial operations in a subsidiary, you have a problem." (JA 359-60).

Apart from the affirmative benefits which would be achieved by total unification, inherent in the parent-subsidiary relationship were complex and continuing corporate and mortgage problems. A subsidiary such as Pacific, even with a small minority interest, would have to be operated in its own best interest. This would create, as El Paso's President stated, "insufferable problems" (R. 2183) in deciding which companies would make contracts, choose corporate opportunities, or undertake financing. (JA 21, 326, 329, 360-62, 364-68, 512-13, 379, 516, 518-19; R. 2183-84, 2188-91).

During the period following January, 1957, El Paso, as may be imagined was well aware of the "antitrust problem" as it might affect the achievement of the benefits of common control, whether in the form of a parent-subsidiary relationship or a merged company. So long as the parent-subsidiary relationship was maintained, the possibility remained that El Paso's stock acquisition might be attacked under Section 7 of the Clayton Act. If such an action were

started and the court were to hold that Section 7 of the Clayton Act were to apply, despite continued Commission regulation of all of the significant activities of both companies including their pipeline operations, their rates and any new construction, the question of El Paso's acquisition might be judged solely in terms of possible impact on competition and not on broader public interest standards. (JA 142-43, 363-64).

In these circumstances, the ability to achieve whatever benefits could be realized from the parent-subsidiary relationship remained in pendant doubt.

On July 22, 1957, the Antitrust Division Commenced an Action Under Section 7 of the Clayton Act Against El Paso and Pacific in the Utah District Court.

On August 7, 1957, El Paso and Pacific Filed Applications With the Commission for Authority to Merge Pursuant to Section 7 of the Natural Gas Act.

On July 16, 1957, the El Paso and Pacific Boards of Directors authorized the filings of applications to the Commission, under Section 7 of the Natural Gas Act, for authority to merge the two companies and thereafter to operate their facilities as a unified and integrated pipeline system. (JA 1182-83, 1293, 1437; Ex. 386, R. 2543, JA 981-82). This action followed, and as El Paso's President testified, was "considerably stimulated" by advice that the Antitrust Division intended to commence an action under Section 7 of the Clayton Act. (JA 142-43, 1183, 1293, 1437).

The Boards of Directors gave consideration to all of the matters and problems involved (JA 142-43):

> "Q. [Mr. Kurtz]. Well, my problem is as it now stands, Pacific is a wholly-owned, for all practical purposes, subsidiary of El Paso. I am trying in my own mind to determine, when you talk of merger,

whether or not you have reference to the fact that El Paso still will continue to operate Pacific or not, and I think that you are thinking of the trust suit in Salt Lake City, are you not? A. [Mr. Kayser]. I am thinking about both of them, of course. The two are related, obviously.

"Now, let me say, if you do not mind, since you bring that up, that in describing where we changed over from operating as a separate company, as we said in the beginning that that was our then intention, and we said, I testified, that we found upon getting into it that obviously there were many things that we could do better if we did not have two corporations, and that we could make a more unified, efficient organization of it by merging the two properties together.

"But our ideas on that were considerably stimulated by the fact that the attorney general of the United States was preparing to file an anti-trust suit against us. Now, we gave consideration to everything involved.

"I used to be a lawyer and you are a lawyer. The issues in the antitrust suit are different from the issues in the merger. The whole public interest is involved in the merger before the Federal Power Commission, and as you know, the law puts the primary jurisdiction to determine whether or not the company should be merged in the Federal Power Commission.

"So for every reason, our own personal reasons, our own self-interest, and in order that the entire situation, the public interest, could be properly considered, we filed just as quickly as we could prepare it an application for the merger."

On July 22, 1957, the Antitrust Division filed a complaint in the United States District Court for the District of Utah, in Salt Lake City, where Pacific's headquarters were located. The complaint alleged that El Paso's acquisition of Pacific's stock violated Section 7 of the Clayton Act. (JA 1175-76, 1293-94, 1437).

After their preparation had been completed, El Paso and Pacific filed applications on August 7, 1957 with the

Commission pursuant to Section 7 of the Natural Gas Act for authority to merge and thereafter to operate as an integrated pipeline system. (JA 1071-1111, 1153, 1183, 1294, 1437).

The applications described in detail El Paso's need for the Pacific facilities proposed to be acquired and the numerous reasons why El Paso's proposed acquisition and utilization of Pacific's facilities would better serve all consumers of both companies through improved gas supply, maximum and efficient utilization of the facilities of both companies, and full realization of the advantages of complete integration. (JA 1071-1111).

In support of these applications, El Paso and Pacific filed detailed information and data relating to their present and past operations. (JA 1085, 1108-09).

It is therefore quite evident that the timing of El Paso's and Pacific's applications to the Commission was stimulated by the action of the Antitrust Division. It is equally evident and a matter of record that El Paso, faced with the growing difficulties of maintaining a parent-subsidiary relationship, upon which it embarked in good faith at the time of the stock acquisition, would eventually be required to apply to the Commission for merger if the substantial and maximum benefits of common control were to be realized and if El Paso's and its consumers' urgent needs were to be satisfied. Moreover, since all of the significant activities of each company were subject to regulation by the Commission—rates, importation of gas, construction of new facilities, extensions of existing facilities, abandonment of facilities—whatever common control could be exercised would have to be exercised pursuant to Commission regulation. Consequently, submission of the plan to the Commission for maximum intergration of these two companies appeared as an inevitable consequence.

In September of 1957, El Paso Moved in the District Court for Dismissal of the Complaint or for a Stay of the Antitrust Proceeding Pending Completion of the Commission Proceeding. The Antitrust Division Opposed the Motion.

The Court Denied the Motion, Largely Because of Assurances by the Antitrust Division That it Would be Prepared to Try the Case Within Three Months and That the Commission Proceeding Would Not Begin Soon.

On September 30, 1957, El Paso and Pacific filed motions in the District Court to dismiss the complaint or to stay the antitrust case pending completion of the Commission proceeding, based on "primary jurisdiction" principles applied to this set of facts.

The Antitrust Division opposed the motion in its entirety. It failed to appraise or appreciate the facts that it had been El Paso's persistent desire since early 1955 to place the matter before the Commission for a determination of whether the proposed unification was required by the public interest and that this desire could now be fulfilled; that with El Paso's experience in operating the companies as parent-subsidiary and the action of the Antitrust Division in instituting its suit, circumstances had changed sufficiently from the time that El Paso had declared in late 1956 its then present intention to continue the parent-subsidiary relationship, to permit a good-faith change in that position. What El Paso had long desired but had been unable to do, could now be done, namely, submit the entire matter to the Commission under Section 7 of the Natural Gas Act. (JA 142-143).

The Antitrust Division also failed to appreciate that its stimulation of the timing of El Paso's proposal to acquire Pacific's facilities, which required a Commission determination under Section 7 of the Natural Gas Act, may have assisted the exercise of the Commission's regulatory authority over these two natural gas companies.

On October 5, 1957, El Paso's and Pacific's motions to dismiss the complaint, or in the alternative to stay the Clayton Act case until completion of the Federal Power Commission proceeding, came on for hearing before the District Court. The Attorneys General of eight western states (or their deputies), appeared as amici curiae in support of one or both of El Paso's and Pacific's motions. (DCT Oct. 5, 1957, pp. 3, 7, 17; DCT Oct. 21, 1957, pp. 1-2).

The Attorney General of California (by his deputy) affirmatively supported El Paso's and Pacific's motion to stay proceedings in the Clayton Act case until completion of the Commission proceeding. (DCT Oct. 5, 1957, pp. 7, 17; DCT Oct. 21, 1957, pp. 1-2).

At the close of the second day of argument on El Paso's and Pacific's motion, the District Court denied that motion, largely on the basis, as it stated a year later, of assurances by the Antitrust Division that it was prepared to try the case within three months and the representation by the Antitrust Division that based on informal conferences with the Commission Staff, the Commission proceeding would not commence for some time. (DCT Oct. 21, 1957, pp. 26-30, 69-70; DCT Sept. 6, 1958, p. 41; DCT June 26, 1959, pp. 18-20).

El Paso's and Pacific's petition for a leave to file an extraordinary writ of certiorari was denied by this Court on March 3, 1958. *El Paso Natural Gas Co.* v. *United States*, 355 U. S. 950.

In his brief in opposition to that petition, the then Solicitor General stated, among other things:

> "... whatever the District Court's decision may be, it cannot oust the Commission of jurisdiction to decide the asset consolidation proceeding—just as a prior decision by the Commission could not oust the District Court of its jurisdiction to decide the Clayton Act Case." (Solicitor General's brief, p. 10, No. 365 Misc., Oct. T. 1957).

The Trial Date of March 3, 1958 Set by the District Court for the Antitrust Case Was Postponed Indefinitely Because of the Antitrust Division's Delay and Failure to be Prepared for Trial.

El Paso and Pacific voluntarily produced to the Antitrust Division voluminous documents demanded by it pursuant to Rule 34 of the Federal Rules of Civil Procedure. The production of documents was completed between December 11, 1957 and February 3, 1958.

On January 10, 1958, El Paso and Pacific filed and served interrogatories upon the Antitrust Division.

However, at the time of the hearing held on February 18, 1958 the Antitrust Division had not answered many of the interrogatories of El Paso and Pacific and the Court found that the Antitrust Division's delay and inability to answer the interrogatories were due to the fact that the Antitrust Division had not yet formulated its position in the case for purposes of trial.

Thereupon, the Court, *sua sponte*, vacated the trial date which had been scheduled for March 3, 1958 because of the failure of the Antitrust Division to be prepared for trial.

Despite Secret and Ex Parte Efforts by the Antitrust Division to Persuade the Commission to Stay Its Proceeding, the Commission in July of 1958 Set El Paso's and Pacific's Applications for Hearing on September 17, 1958.

1. ***Between August 1957 and May 1958, El Paso and Pacific filed voluminous additional information in response to several successive requests of the Commission and its Staff.***

Following the filing of their applications, on August 7, 1957, and during the ten-month period which followed until June of 1958, El Paso and Pacific were engaged in supplying voluminous additional information to the Commission, in the form of seven supplements to those applications. The

Commission or its Staff had requested the information in various letters which were written to El Paso and Pacific at succeeding times during this period. (See R. 3058-816, 7066-219, 7288-350, 13269-14656, 14658-701, 14799-805).

2. ***When it became apparent that the Commission planned to set its hearing, the Antitrust Division exerted secret and ex parte pressure on the Commission to stay its proceeding until the antitrust case could be tried.***

By early May, 1958, with most of the requested information already filed with the Commission, it was apparent that the Commission would soon set the applications down for hearing.

On March 6, 1958, the Attorney General of the United States testified before a Senate Subcommittee on Constitutional Rights. In the course of that testimony, he said that a regulatory agency in deciding adversary proceedings, should be free of any ex parte demands from Congress or the Executive Branch. He said the same principles which apply in court proceedings should apply in agency proceedings and he said "there should be no ex parte communications from any source."[1]

We come, precisely two months later, to May 6, 1958, when the Assistant Attorney General of the United States in charge of the Antitrust Division wrote a secret and ex parte letter to the Chairman of the Federal Power Commission. What was said in that letter and in the exchange of correspondence which took place thereafter during the Spring of 1958, was not learned by El Paso and Pacific and the more than 40 other parties including various state officials, in the Commission proceeding, until on and after September 5, 1958, for reasons we shall see shortly.[2]

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[1] Hearings Before a Subcommittee on Constitutional Rights of the Committee on the Judiciary, on S. 921, United States Senate, 85th Cong., 2d Sess., Part 1 (March 6, 1958), p. 23.

[2] All of the correspondence between the Antitrust Division and the Commission from May 6, 1958 to July 29, 1958 were included in Exhibit A to the Affidavit of John T. Duffner, Antitrust Division Attorney, filed in the District Court on September 5, 1958. See p. 97, infra.

In this secret and ex parte letter of May 6, 1958, which quite evidently was written because of the Antitrust Division's failure to be prepared for trial as scheduled and its anticipation that it would be some time before it could be prepared for trial, the Antitrust Division requested that

> "you [the Commission] stay your hand until the Utah District Court has determined the pending antitrust case. . . ."

On May 12, 1958, the Chairman of the Commission wrote to the Antitrust Division and acknowledged the letter of May 6th. He said that he would call the matter to the attention of the other members of the Commission.

On May 23rd, the same Assistant Attorney General wrote another secret and ex parte letter to the Chairman of the Commission in which he emphasized the urgency to the Antitrust Division of having the Commission proceeding stayed pending trial of the antitrust case.

On May 29th, the Chairman of the Commission replied and said that El Paso and Pacific were still in the process of supplying information requested by the Staff. He added that as soon as that work was completed, the Commission would give "further consideration . . . to the question of setting the applications for hearing."

On June 5th, El Paso filed with the Commission its Seventh Supplement to its application and shortly thereafter completed supplying all of the information requested by the Staff of the Commission. (R. 14660-88).

On June 10, 1958, again secretly, the Assistant Attorney General in charge of the Antitrust Division wrote to the Chairman of the Commission asking to be kept advised with respect to the matter of a hearing on El Paso's and Pacific's applications.

Although the Commission did not respond to this letter, on June 20th the Assistant Attorney General wrote a

further secret and ex parte letter to the Chairman of the Commission thanking him for the Commission's continuing consideration of his request that the hearing of El Paso's and Pacific's applications "be stayed pending trial of the antitrust suit. . . ."

We shift the locale of this story momentarily from the Commission to the antitrust case. On July 7, 1958, the Department of Justice advised counsel for El Paso and Pacific that it would voluntarily produce various documents informally requested by the defendants, if and only if, they withdrew their requests for certain documents including any secret correspondence between the Antitrust Division of the Department of Justice and the Commission. One of the attorneys for El Paso in the Commission proceeding had noticed in the public files of the Commission that a letter dated May 12, 1958 had been written by the Chairman of the Commission to the Assistant Attorney General of the Antitrust Division acknowledging receipt of a letter from him dated May 6, 1958 which, however, was not in the Commission's public files and the contents of which, therefore, were unknown.

Accordingly, defendants El Paso and Pacific demanded of the Antitrust Division in the antitrust case that its letter of May 6, 1958 be produced, and any other correspondence between the Antitrust Division and the Commission which may have occurred, but the existence of which was unknown.

El Paso and Pacific refused to agree to a condition sought to be imposed by the Antitrust Division that if El Paso and Pacific withdrew their request for the secret correspondence, the Antitrust Division would produce voluntarily other documents relevant to the Clayton Act case. Accordingly, on July 30, 1958, El Paso and Pacific moved in the District Court under Rule 34 of the Federal Rules of Civil Procedure for the production of the secret and ex parte correspondence between the Antitrust Division and the Commission and certain other documents which

had been identified in the Antitrust Division's answers to El Paso's and Pacific's interrogatories.[1]

Five days earlier, on July 25, 1958, and despite the pressure of the Antitrust Division, the Commission set September 17, 1958 as the date for the commencement of hearings on the El Paso and Pacific applications. (JA 1133-34, 1153).

The Commission granted leave to intervene in the proceedings to many different parties, one of which was the Attorney General of California. (JA 1154-56, 1294).

On July 29, 1958, the Chairman of the Commission wrote to the Assistant Attorney General in charge of the Antitrust Division and invited the Department of Justice to participate in the Commission proceeding:

> "You are invited of course to participate in this proceeding to whatever extent you deem necessary and we will endeavor to cooperate with you in every way possible, making available all of the papers filed and hearing transcripts and any exhibits which may be offered. If you care to have any of your representatives confer with our staff, we will be glad to have this done. If you have any information which you regard as likely to be helpful to the Commission, we would appreciate having it made available at the earliest possible moment or presented in the hearing together with any suggestions that you feel would be helpful."

The Department of Justice never intervened or participated in the Commission proceedings.

On May 29, 1959, the Attorney General of the United States wrote to the House Committee on Legislative Oversight concerning the numerous instances of the Department of Justice's participation as a party in administrative agency proceedings. He said that it was a duty

[1] Some answers had been supplied by the Antitrust Division on July 14, 1958, but the Antitrust Division had not yet completed all of its answers to the interrogatories. The Antitrust Division's continued inability to proceed to trial was further indicated on August 7, 1958, when it served upon El Paso 103 interrogatories and upon Pacific 95 interrogatories, all of which had numerous subdivisions.

of the Department of Justice to intervene in such proceedings where matters involving the interests of the United States or its citizens are involved. He cited the decision in *Far East Conference* v. *United States*, 342 U. S. 570, 576 (1952) and other decisions in support of the undoubted right and duty of the Department to participate in agency proceedings as a party, where it may determine that the interests of the United States are involved. He made no reference, however, to the reasons why the Department of Justice had not intervened in the Commission proceedings in the El Paso-Pacific merger case.

The Hearings in the District Court Held on September 5 and 6, 1958: the Antitrust Division Serves and Then Withdraws a Motion to Enjoin El Paso and Pacific From Participating in the Forthcoming Commission Proceeding; Its Alternative Motion to Enjoin El Paso and Pacific From Merger in the Event the Commission Should Issue the Requisite Order Is Denied.

The Antitrust Division Finally Produces the Secret and Ex Parte Correspondence Between Itself and the Commission.

A hearing in the District Court had been scheduled for September 5, 1958, regarding several pre-trial matters in the antitrust case.

In open Court at the outset of the hearing, the Antitrust Division served upon El Paso and Pacific a motion for a preliminary injunction to restrain El Paso and Pacific from participating in the Commission proceeding scheduled to start 12 days later, on September 17. In the alternative, the Antitrust Division moved to restrain El Paso from acquiring and operating Pacific's facilities until after a final determination of the antitrust case, even if such acquisition and operation were authorized by an order of the Commission. (DCT Sept. 5, 1958, pp. 1-10).

El Paso's and Pacific's demand under Rule 34 for the production of the secret and ex parte correspondence between the Antitrust Division and the Commission was scheduled to be heard by the Court, among other matters, on September 5, 1958. However, Exhibit A to the affidavit of counsel for the Antitrust Division submitted in support of its motions for preliminary injunctions included, among other things, all of such correspondence. Thus in this fashion, their contents became publicly known for the first time.

The Court scheduled and held argument on the Antitrust Division's new motions on the following day, September 6th. Counsel for the Antitrust Division announced at the outset that it was withdrawing its motion (served the previous day) to enjoin El Paso and Pacific from participating in the forthcoming Commission proceeding. (DCT Sept. 6, 1958, p. 1).

Argument was then heard on the Antitrust Division's alternative motion to enjoin El Paso from acquiring and operating Pacific's facilities, in the event the Commission issued the requisite order under Section 7 of the Natural Gas Act. The Court denied this motion in all respects.

The Antitrust Division sought no appellate review or relief from this decision either before or after the Court decided on October 10, 1958, as more fully described below, to continue the trial of the antitrust case until after final determination of the applications pending before the Commission.

Nor, more than a year later, did the Antitrust Division renew that motion or attempt to halt the consummation of the merger after it had been certificated by the Commission's order of December 23, 1959.

With the hearing in the Commission proceeding scheduled to begin on September 17th, the Court set November 17th as the new trial date in the antitrust action. However, during the oral argument on September 6th, the Court

indicated quite clearly that the trial of the case might be a futile act if the Commission were to find ultimately that the unification of El Paso and Pacific was in the public interest.

The Attorney General of California Moved in the Commission on September 8, 1958, to Stay the Commission Proceeding Until After Completion of the Antitrust Case. The Motion Was Denied by the Commission on September 15, 1958.

A motion was filed by the Attorney General of California with the Commission on September 8, 1958 seeking a stay of further Commission proceedings in the El Paso-Pacific merger case until after final determination of the antitrust suit in Salt Lake City. (JA 1135-47, 1176). This motion constituted a complete about-face by the Attorney General of California, who, a year earlier in the District Court, had supported El Paso's motion to stay the antitrust case until completion of the Commission proceeding.

On September 15, 1958, the Commission issued an order in which it denied the motion for stay. (JA 1147-48, 1176-77, 1294). It held that "an early hearing covering all of the issues involved by the above applications will be in the public interest . . ." (JA 1148).

The Hearings Before the Presiding Examiner Started on September 17, 1958. The Attorney General of California Asserted Implacable Opposition to the Proposed Unification of El Paso and Pacific.

Hearings opened in the Commission on September 17, 1958, before Presiding Examiner Kelly. (JA 1153, 1177, 1295).

More than 40 parties appeared including various representatives of state and municipal agencies. (R. 1-4, 7-16, 164). During the proceedings before the Commission, eight states, each through its attorney general or its state

utility regulatory agency, actively and affirmatively supported the proposed unification of El Paso and Pacific. (JA 1155-56; R. 20-22, 32-37, 232-35, 665-66).

The states were Arizona, Idaho, Nevada, New Mexico, Oregon, Texas, Washington and Wyoming. (JA 1155-56).

In his opening statement, counsel for the Attorney General of California stated the reason for his opposition of the merger:

> "It is our position, on behalf of California consumers, that this vital commodity is best supplied in a possible future competitive setting. We feel that neither our distributing utilities, nor our ultimate consumers, should beholden to but one supplier. It is our position that absent the benefits of the competition factor, El Paso is in an unduly advantageous bargaining position with reference to California so far as price and availability of natural gas are concerned.
>
> "The State of California asks this Commission to weigh . . . this case with the theory and philosophy underlying the express policy of the Congress and the electorate relating to monopoly situations as expressed in the laws pertaining thereto. We point out to the Examiner and to this Commission that the issues here involved have been made the subject of a complaint by the Department of Justice of the United States of America in the United States District Court of the District of Utah. . . .
>
> "In brief, California has no wish to be made solely dependent for a commodity so vital as this upon a single supplier. It is our position that industry and consumers alike benefit mutually from operations conducted within the free enterprise system of which the dominant characteristic is said to be healthy competition.
>
> "California is not served, with reference to other vital services in the field of transportation, banking, or whatever, by a single corporation. We have no wish to depart from that situation simply because the commodity we are now seeking is natural gas." (JA 6-7)

Moments later, counsel for the Attorney General of California made it quite clear that his position would be in no way swayed by any of the evidence which might be presented:

> "Mr. Bennett: Mr. Examiner, now that I have departed from the text, let me say without qualification that I am certain that no matter what is developed here by the corporate applicants, our position will not be changed in the leastwise. We have definite notions about this merger. . . ." (JA 7-8)

Witnesses offered in support of the applications testified from day to day starting on September 17, 1958, and until September 26, 1958. (R. 45-1099).

On September 26th, at the request of the Staff and intervenors, a recess was granted by the Presiding Examiner until November 12th, at which time cross-examination and the presentation of evidence by other parties were scheduled to start, with the exception, however, that the testimony of Mr. Fish, the principal promoter and the former Chairman of Pacific, who was then in Argentina, would be taken on October 20th. (R. 1019-20, 1100-01).

On October 2, 1958, El Paso and Pacific Moved for a Continuance of the Trial of the Antitrust Action.

On October 6th, the Antitrust Division Again Exerted Secret and Ex Parte Pressure Upon the Commission to Stay the Hearings Before the Presiding Examiner.

On October 7th, the Commission Wrote to the District Court Deferring to Its Judgment as to Which Proceeding Should Go First.

On October 10th, the District Court Ordered the Antitrust Case Continued "Until Final Determination" of the Applications Before the Commission.

Shortly after the recess of hearings before the Presiding Examiner, and on October 2, 1958, El Paso and

Pacific served and filed in the District Court an application to continue the trial of the antitrust case, in view of the proceedings which had already occurred before the Commission.

On October 6, 1958, the Assistant Attorney General in charge of the Antitrust Division again wrote secretly and ex parte to the Commission. He requested "a postponement of the Examiner's hearings" by the Commission pending trial of the antitrust action.

He said in this secret letter to the Commission that El Paso and Pacific had moved in the District Court for a continuance of the antitrust action, but that if his request were granted by the Commission, the "argument of that motion might well be unnecessary".

On October 7th, the Chairman of the Commission wrote to the District Court. He first referred to the request of the Antitrust Division in its October 6th letter that the Commission stay its hearings pending the trial of the antitrust case. He pointed out that the Antitrust Division had not intervened in the Commission proceeding and, therefore, had no standing to move for a postponement of those hearings.

The Chairman of the Commission stated to the Court that the Commission was reluctant to accede to the request of the Antitrust Division without a hearing, but that in view of El Paso's and Pacific's motion for a continuance of the antitrust proceeding which would bring the question on for hearing before the Court, the Commission would defer to the judgment of the Court as to which proceeding should go forward first.

The Chairman of the Commission said that in the event the Court were to deny El Paso's and Pacific's motion for a continuance, the Commission would stay its proceedings; or, if the Court were to grant El Paso's and Pacific's motion for a continuance, the Commission would proceed with its hearing and to a determination in its case.

The Commission simultaneously sent copies of its letter to the Court, to the Antitrust Division and to El Paso which El Paso received on October 9th.[1]

On the following day, October 10th, oral argument was held in the District Court in Salt Lake City on El Paso's and Pacific's motion for continuance. (JA 280, 1177).

In a closing colloquy, the attorney for the Antitrust Division conceded the appropriateness of deferring to the Commission's decision if it were found that the unification of El Paso and Pacific was in the public interest:

> "The Court: Mr. Ward, suppose after hearing voluminous testimony and exhibits the Federal Power Commission decides that it is in the public interest and issues a certificate of convenience and necessity and permits the merger. Now, if that is in the public interest, why should we 'monkey around' with this Clayton Act violation? If the merger of those two great companies into one is in the public interest, and so found by the great Commission which has been vested with authority to so determine by Congress, why should we here be fussing around with whether or not there was a technical violation of Section 7 of the Clayton Act and talk about divesting the stock now?
>
> "Mr. Ward: [Department of Justice attorney] I think—
>
> "The Court: There is a great deal of merit, it seems to me, in waiting until we find out what are the views of the Federal Power Commission with respect to this merger. And I had that in mind last time [September 6, 1958] when I suggested to you that it could be that this whole thing is moot.
>
> "Suppose the Federal Power Commission determines that the merger by acquisition of the assets and the dissolution of the Pacific Northwest is in the public interest and the merger should go ahead. Well, do you think this Court, after that, ought to

[1] Also on October 9th, El Paso received a letter of October 7th from the Antitrust Division which enclosed a copy of the Division's letter of October 6th to the Commission.

> say, 'Well, fellows, don't dissolve that corporation now because we are going to order El Paso to make restitution to the stockholders from when they acquired the Pacific Northwest stock'? Do you think we ought to do that?
>
> "Mr. Ward: If you state the problem that way, I don't think so." (DCT Oct. 10, 1958, pp. 53-54)

There was considerable discussion during the argument concerning the impact upon the Clayton Act case of a possible Commission order pursuant to Section 7 of the Natural Gas Act authorizing the merger, including the meaning of the last paragraph of Section 7 of the Clayton Act. It provides, in part, "nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission, . . . under any statutory provision vesting such power in such Commission. . . ."

The District Court stated repeatedly that in its opinion a determination of the effect of that statutory paragraph prior to Commission decision would be premature; and that further action by the Court should await the actual findings and order of the Commission.

The District Court then described the further proceedings it contemplated in the antitrust case, once the Commission proceedings had reached their final determination:

> "The Court: . . . If the Federal Power Commission denies the merger, you [the Antitrust Division] will go right ahead with this. If the Federal Power Commission allows the merger, then I want to hear you on a question of law involved in that provision [the last paragraph of Section 7 of the Clayton Act] we have been considering." (Id., p. 57)

After brief further discussion the Court granted the motion for continuance.

The order of the Court entered on October 13, 1958 provided:

> "Now, Therefore, after oral argument and full consideration of said application and of the letter to the Chairman of the Federal Power Commission from the Chief of the Anti-trust Division of the Department of Justice dated October 6, 1958, and of the letter to this Court from the Chairman of the Federal Power Commission dated October 7, 1958, the application of the defendants is granted, and the trial of this action is hereby continued until the final determination by the Federal Power Commission of the applications now pending before it in Docket Nos. G-13018 and G-13019. It is further provided and ordered that the pretrial conference heretofore fixed for November 3, 1958, and the time for defendants to answer the interrogatories heretofore propounded to them by plaintiff are hereby continued until such dates as this Court may hereafter designate." (JA 280-81, 1177-78)

The Antitrust Division sought no appellate review or relief from this order. Thereafter, it did not seek to intervene as a party in the Commission proceedings or present its views to the Commission, as a party or otherwise.[1]

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[1] Since October 13, 1958, and in view of the continued pendency of the Commission proceeding and the subsequent appellate review of the Commission's order, the District Court has adhered to its determination to await the final outcome of the Commission's case before resuming proceedings in the antitrust case.

On June 5, 1959, the Antitrust Division moved in the District Court to compel El Paso and Pacific to answer the interrogatories previously served upon them. But the District Court denied the motion in all respects and repeated its determination to await the final outcome of the Commission proceeding.

On June 1, 1960, the Antitrust Division filed another motion in the District Court, this time to strike El Paso's affirmative defenses and for other relief. The Court deferred any hearing on the motion pending final determination of the validity of the Commission's order of December 23, 1959, which was then being challenged in the Court of Appeals.

During October of 1960, the Antitrust Division filed a new motion, its last to date in the District Court. It sought permission to amend its complaint to allege that El Paso's acquisition of Pacific's assets pursuant to the order of the Commission of December 23, 1959 violated Section 7 of the Clayton Act. The District Court again deferred any hearings pending final determination of the validity of the Commission's order, in pursuance of the Court's order of October 13, 1958.

The Hearings Before the Presiding Examiner Resumed on October 20, 1958. After Cross-examination and Presentation of Other Evidence, the Hearings were Concluded on January 6, 1959.

All of the Parties to the Hearings Were Given a Full Opportunity to Present Witnesses, to Offer Evidence and to Cross-examine.

As scheduled, the hearings before the Presiding Examiner resumed on October 20, 1958 and then recessed until November 12th, at which time cross-examination and the presentation of other evidence was commenced. The hearings before the Presiding Examiner were concluded on January 6, 1959.

Between September 17, 1958 and January 6, 1959, there were, in all, 23 days of hearings. Twenty-two witnesses testified in support of the proposed unification of El Paso and Pacific. Two witnesses were offered by the Staff of the Commission, one witness was offered by PG&E, and one witness was offered by the Southern California Companies, and their testimony related to market, rate and cost matters.

1. *The Attorney General of California was afforded full opportunity to cross-examine. He presented no witnesses.*

Counsel for the Attorney General of California conducted cross-examination of many witnesses who testified in support of the proposed unification of El Paso and Pacific. In no instance was his cross-examination foreclosed or precluded and, in each instance counsel for the Attorney General pursued his cross-examination until he changed to another subject voluntarily and of his own accord.

The Attorney General of California presented no witnesses during the hearings.

2. ***All of the documentary exhibits and items were received in evidence by the Presiding Examiner without objection by any party. Many were required to be introduced under Commission rules.***

Approximately 500 exhibits and items by reference (exhibits incorporated from other Commission proceedings) were introduced and received by the Presiding Examiner. The bulk of the exhibits and items were introduced by El Paso and Pacific.

No objection was made by any party to their reception in evidence.

Most of the numerous and voluminous exhibits or items, including more than 300 gas supply contracts and gas sales agreements, were required by the Commission's regulations to be introduced. Many of the exhibits contained important and precise but non-controversial information relating to the present and past business operations of El Paso and Pacific, including "flow charts", and detailed economic and geological information and other technical data relating to El Paso and Pacific.

Several of the exhibits were minutes of meetings of the boards of directors of Pacific and El Paso. Many others were contracts and other documents showing the pre-merger relationship between the two companies, and their relationships with other companies.

The Attorney General of California did not introduce any exhibits, just as he did not offer any witnesses.

3. ***The Attorney General of California took no objection to any of the rulings made by the Presiding Examiner.***

During the course of the hearings, the Presiding Examiner made certain rulings. Counsel for the Attorney General of California did not, in any instance, assert an objection to the ruling or indicate to the Presiding Ex-

aminer that he desired to pursue a course contrary to such ruling.

For example, near the end of one of the hearing sessions after questioning had been completed for that day, a long colloquy occurred among counsel and the Presiding Examiner. At the end of that colloquy, the Presiding Examiner made a ruling relating to the matters discussed, to which no objection was taken by any party to the proceedings, and with which all parties seemed to agree:

> "Presiding Examiner: Well, unless I am directed to do so by order of the Commission, I am not going to make a rate case out of this—whether they are lawful under Section 4(a) or 4(b), whatever it is, of the Act. I am not going to do it unless directed to do it.
>
> "Mr. Kurtz [Staff Counsel]: I think maybe what you are saying, Mr. Examiner, you are not going to come out and say this is going to be the rate in the future, but you are interested, I believe, in the cost and the impact upon the consumer.
>
> "Presiding Examiner: I think so, and for that purpose; yes.
>
> "Mr. Kurtz: Certainly.
>
> "Presiding Examiner: But I have gone into this just thinking out loud. I do not claim to be an oracle or anything of the kind, or the smartest man on earth. I just wanted a little enlightenment.
>
> "I have it, gentlemen, and I thank you." (JA 443-44)

4. *The Presiding Examiner conducted the Hearings with utmost fairness to all parties.*

The record of the hearings before Presiding Examiner Kelly shows that he conducted them with the utmost fairness and consideration to all of the parties. Every party was given a full opportunity to present evidence, to prepare for cross-examination, to cross-examine and to be heard.

The Impact of the Merger Upon Competition Was Raised by the Attorney General of California as an Issue and was Recognized by the Presiding Examiner and All of the Parties as one of the Issues in the Case.

Following the opening statement (p. 99 supra) of counsel for the Attorney General of California that California desired natural gas service in a competitive setting, the Presiding Examiner stated: "Well that gives us a clear-cut issue to try here. That is what these tribunals set up by the Government are for, to try just such issues". (JA 8).

Later during the hearings, the Presiding Examiner reiterated the importance of the "competition" issue:

> "Mr. Furbush [Counsel for PG&E]: I would like to object to turning this case into a showing of comparative prices of gas between comparative projects. . . .
>
> • • • •
>
> "Mr. Kurtz: Mr. Examiner, I think it is perfectly proper.
>
> "Here we have El Paso, we have Trans-Western; and I think these are vital matters to the case.
>
> "I will ask the question, then:
>
> "What is the price at the border off the Provo line?
>
> "Presiding Examiner: I think it is highly competent, gentlemen. We have the question of competition, certainly. It has to be considered in this case. We certainly have the question of competition." (JA 204-05)

During the hearings, there was considerable evidence relating to the activities of various companies who were competing and acquiring gas supply in the regions in which El Paso and Pacific were seeking to acquire gas supply. (See pp. 180-81, infra).

There was considerable testimony relating to several other proposed pipeline projects to transport natural gas to the California markets. Two such projects are of particular interest here, because they were certificated by the Commission and because today gas is flowing in substantial quantities to California through these newly certificated pipelines.

We refer to the pipeline project of PG&E and its subsidiary PGT. And, we refer to the pipeline project of the Transwestern Pipeline Company.

1. *PG&E's Pipeline Project to Transport Canadian Gas to California*

As early as 1953, there was some indication that PG&E was thinking about organizing its own project to transport Canadian gas by long-distance and large-diameter pipeline to California. PG&E, since it was the distribution utility serving all of northern California, had its own assured market. It needed, however, to acquire a sufficient quantity of gas supply which would make construction of a long-distance pipeline feasible. (JA 130, 171, 1191).

PG&E conducted a buying campaign in Canada and ultimately acquired a sufficiently large supply of gas to support the construction of a pipeline capable of initial deliveries to northern California of more than 400 million cubic feet per day. (JA 131, 175, 530, 700-01, 707-08, 1191).

PG&E's proposal to build its own pipeline from Canada to the San Francisco Bay area was known publicly as early as 1956, and was formally announced by PG&E in July of 1957. (JA 131, 270).

We have seen PG&E's outright refusal in 1955 to purchase Canadian gas from El Paso. We have seen the PG&E rejection in 1955 of El Paso's proposal to build a pipeline from Pendleton to Klamath Falls, the very route followed by PGT's pipeline today. (JA 307-08, 1168-69, 1188, 1296, Ex. 1, R. 46, JA 564; R. 1524-25; 24 F.P.C. 134).

It will be recalled that in the early fall of 1956, Edison terminated its "preliminary letter agreement" with Pacific. (JA 458-59).

Within a few days thereafter, Pacific approached PG&E to determine whether PG&E was interested in buying Canadian gas from Pacific. PG&E said that it was not and the discussion went no further. (JA 247-48).

At about the same time, El Paso approached PG&E and got the same answer. In this context, Mr. Kayser, President of El Paso, testified that:

> "We [El Paso and Pacific] were both trying to sell specifically Pacific Gas & Electric Company quantities of gas." (JA 308)

After El Paso had acquired stock control of Pacific Northwest, El Paso again approached PG&E with a new proposal which PG&E declined. (JA 130-31). This proposal, referred to in the record as the "Provo-Las Vegas" project, met with the approval of the Southern California Companies, and that project is now the subject of hearings before the Commission.

All of these facts were brought out in the testimonial and documentary evidence received during the hearings in this case and which is in the record before this Court. (JA 11-12, 46, 130-33, 137-38, 146-49, 174-81, 270, Ex. 1, R. 46, JA 564, Ex. 29, R. 1229, JA 700-01, 707-08).

Many other facts are in the evidence, such as the activity of PG&E in Canada seeking to acquire gas, the proposed and comparative cost of the Canadian gas to PGT, and the delivered price of the Canadian gas in the San Francisco area. (JA 46, 526-30; R. 2249-50, 2260-74).

Counsel for the Attorney General of California, among others, cross-examined on these and other subjects relating to PG&E and its PGT line. (JA 146-49, 308, 346-51, 376, 417-18, 526-30; R. 2260-74).

All of this evidence was introduced prior to the filing of the applications for certification of the PGT project, which occurred on December 29, 1958. (JA 1169, 1344).

Hearings were held before the Commission in the PGT proceeding during 1959 and 1960. On August 5, 1960, the Commission issued its order which, among other things, certificated the construction of the PGT pipeline to bring Canadian gas directly to northern California. (24 F.P.C. 134).

Thus, when the Presiding Examiner on November 20, 1959 issued his decision, and when the Commission on December 23, 1959 issued its decision in the El Paso-Pacific merger case, the PGT applications were pending but not yet decided. The Presiding Examiner and the Commission made their findings relating to PGT based on the evidence in this record, and they referred to the pendency of the applications for certification as a further indication of the substantial competition which El Paso faced in providing new service to the California markets. (JA 1187-88, 1191-92, 1296-97, 1356).

In the exceptions to the decision of the Presiding Examiner which petitioner filed with the Commission, petitioner took no exception to the Presiding Examiner's reference to the pendency of the PGT applications. (JA 1277-89).

2. *The Transwestern Pipeline Project*

On April 15, 1958, Transwestern Pipeline Company filed applications with the Commission for a certificate to construct a pipeline from Texas to California, and to deliver upwards of 300 million cubic feet per day to the Southern California Companies. This was some six months prior to the time hearings in the El Paso-Pacific merger case commenced before the Presiding Examiner. (JA 11, 133-34, 1344; 22 F.P.C. 391, 407).

Transwestern was organized by a number of gas and oil producers, including Monterey Oil and Warren Petroleum, and supported by others including Gulf Oil Company, which owned or had committed to it relatively large supplies of natural gas in the Permian Basin area. Trans-

western made additional efforts to acquire other quantities of gas supply. (JA 134).[1]

The organizers and supporters of Transwestern had control of large quantities of gas reserves which El Paso therefore could not acquire. Transwestern thus exemplifies a pipeline competitor which has certain assured sources of supply and needs to find a market for the quantities of gas available to it before applying to the Federal Power Commission for a certificate. In the case of Transwestern, the market was supplied by the Southern California Companies which agreed to purchase the Transwestern gas. (JA 270; 22 F.P.C. 391).

Considerable testimonial and documentary evidence relating to Transwestern and its activities was presented during the El Paso-Pacific merger hearings. (JA 11, 46, 133-34, 137-38, 147-48, 200-03, 270; Ex. 1, R. 46, JA 564; Ex. 83, R. 1229, JA 715, 719, 721-23). Petitioner's counsel, among others, cross-examined with respect to these matters. (JA 138, 140, 147-48, 203, 304-06, 341-42, 405-06, 412, 415-16, 472-76, 531).

On August 5, 1959, the Commission issued a certificate to Transwestern authorizing the construction of its proposed pipeline and the delivery of 300 million cubic feet of gas per day to the Southern California Companies. (JA 1187-88, 1190, 1296, 1344, 1356; 22 F.P.C. 391).

In his decision of November 20, 1959 in the merger proceeding, the Presiding Examiner made findings based on

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[1] One of these efforts, described by petitioner in its statement of the case (Pet. 13) but in a fashion directly contrary to the facts and the record, was in the Aneth oil field of southeastern Utah, about 70 miles from the northwestern corner of the San Juan Basin.

Transwestern, which sought certain quantities of Aneth gas as a partial source of supply more proximate to California than equal quantities of Permian Basin gas, came into the area seeking to purchase gas after El Paso already had offered producers 14 cents per thousand cubic feet. Transwestern tried to better that offer by proposing 17 cents and then 20 cents. El Paso, however, acquired the gas supply at 20 cents. As the Commission found on the evidence in the recent Aneth producer proceeding "while El Paso made determined efforts to obtain the Aneth gas at prices substantially lower than that finally agreed upon, its efforts were unsuccessful." (23 F.P.C. 370, 375; JA 341-43; 472-74).

the evidence in the record relating to Transwestern, including the fact that by adding compression to its proposed facilities, Transwestern could add 290 million cubic feet per day of capacity. He also referred to the Commission's certification of Transwestern as further confirmation of his conclusion that Transwestern constituted a new and substantial pipeline competitor in the long-distance transportation of natural gas to California. (JA 1187-88, 1190-92, 1195; 22 F.P.C. 391; see also JA 1356-57).

After the Hearings Were Concluded, Five Months Were Allowed by the Presiding Examiner for the Filing of Extensive Briefs by the Various Parties.

The hearings before the Presiding Examiner concluded on January 6, 1959. During the following five-month period, until June 1, 1959, the various interested parties prepared and filed their briefs and had an opportunity to reply to the contentions of the other parties. (JA 1153-56, 1295, 1343; R. 1292, 2909-11).

During that period, the Staff of the Commission announced its opposition to the merger. Accordingly, the Staff and the Attorney General of California filed briefs in opposition to the merger, and were the only parties of the more than 40 which asserted that position. (JA 1155).

On February 17, 1959, the California Public Utilities Commission, though not a party to these proceedings,[1] wrote a letter to the Commission in which it urged neither approval nor denial of the applications. It stated that in the event the Commission approved the merger, a condition should be imposed to protect California utilities against any increase in rates which El Paso might claim in the

[1] In many other Commission proceedings relating to El Paso matters, the California Public Utilities Commission and the Attorney General of California have each intervened as separate parties. At times, they have asserted different positions.

future because of any alleged dilution of earnings which might result from the merger.

Briefs were filed by the eight western states which supported the merger; and, on June 1, 1959, El Paso and Pacific filed their reply brief. (JA 1154-56 and fn. 1, JA 1156).

The Presiding Examiner Issued His Decision on November 20, 1959. El Paso and Pacific Requested a Prompt Oral Argument Which the Commission Heard on December 10, 1959.

More than five months after he received the last brief, the Presiding Examiner issued and filed with the Commission his comprehensive 62-page opinion and order, in which he concluded that El Paso's acquisition of Pacific's facilities and operation thereafter as part of an integrated pipeline system, was required by the public convenience and necessity. (JA 1149-1240).

On November 20th, El Paso and Pacific served on all of the parties to the proceedings and filed with the Commission a motion requesting that the Commission hear oral argument promptly. This motion reiterated the fact that, under the tax laws, the $9 million tax loss carry-forward arising from Pacific's operations in 1955 would be lost unless the merger, if it were to be authorized by the Commission, were consummated on December 31, 1959.[1] None of the parties objected to El Paso's and Pacific's motion. (JA 1241-43).

The Commission fixed December 7, 1959 as the final date for the filing of exceptions to the Presiding Examiner's decision. (JA 1244).

On December 10th, the Commission heard a full day of oral argument on the exceptions which had been filed. (JA 1348, 1357).

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[1] See JA 396, 516-17; R. 2692.

On December 23, 1959, the Commission Issued Its Order and Certificate Authorizing the Unification of El Paso and Pacific.

On December 16, 1959, counsel for petitioner sent a telegram to the Commission urging the Commission to stay the effectiveness of any decision "for a period of ten days after date of issuance to preserve effective appeal." The Commission did not grant this request. (JA 1348, 1358).

On December 23, 1959, the Commission issued its 14-page order finding that El Paso's proposed acquisition and operation of Pacific's facilities were required by the public convenience and necessity. (JA 1290-1310).

The Commission adopted the decision of the Presiding Examiner, but added two sets of conditions. (JA 1308-10).

First, the Commission conditioned the certificate on the creation by El Paso of a special reserve to be utilized for the benefit of consumers, in respect of Pacific tax loss carry-forwards generated in 1954-1956 which Pacific would have otherwise been unable to utilize but for the merger. (JA 1301, 1309-10).

Second, the Commission imposed more detailed accounting requirements upon El Paso in respect of its entire operations, so as, the Commission held, to assure the availability of cost data for allocation purposes in any future rate proceedings involving the unified company. (JA 1304, 1308-09).

The order and certificate of the Commission required, among other things, that the merger take place pursuant to Delaware law, as proposed, within 30 days. (JA 1308).

On December 24, 1959, El Paso filed its acceptance of the certificate.

In the following seven days, no application was made by any of the parties in the proceeding for a stay of the Commission's order or to a Court of Appeals for such a stay. Section 19(c) of the Natural Gas Act, 15 U.S.C. § 717 r(c).

The Antitrust Division made no effort to halt the consummation of the merger which El Paso on November 20, 1959 had announced in its motion for a prompt hearing it proposed to consummate on December 31, 1959, because of the tax-loss problem, if the Commission issued the requisite order. (JA 1242).

Pursuant to the Commission's Order, the Merger of El Paso and Pacific Was Consummated on December 31, 1959, and Since That Time the Merged Company Has Been Operated as a Single Integrated System.

The merger was consummated on December 31, 1959, under the laws of the State of Delaware and pursuant to the Commission's order of December 23, 1959. It included the elimination of Pacific's common stock held by El Paso, the exchange of the remaining outstanding shares of Pacific's common stock held by others for common stock of El Paso, the redemption of $23 million of Pacific's preferred stock, and the payment of the $163 million of outstanding Pacific mortgage bonds by the issuance of El Paso bonds in like amount and at like interest rates. El Paso reissued, in its own name and without change, the tariff, rate schedules and service agreements of Pacific.[1]

Since December 31, 1959, El Paso has operated its facilities and the Pacific facilities acquired through the merger as a single integrated pipeline system.[2]

Petitioner's Application for Rehearing and Stay Was Denied by the Commission on February 17, 1960.

On January 20, 1960, petitioner filed an application for rehearing and stay of the Commission's order, which the Commission denied in a 4 page order issued on February 17, 1960. (JA 1340-58).

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[1] El Paso Motion for Intervention, C.A.D.C., pp. 4-5. (See JA 87-94, 497-500, 1339).

[2] Id. at p. 4.

In April of 1960, Petitioner Instituted the Appellate Review Proceeding.

On April 18, 1960, a petition to review the Commission's orders of December 23, 1959 and February 17, 1960 was filed by petitioner in the United States Court of Appeals for the District of Columbia Circuit. (JA 1361-65).

The petition specified six alleged errors. There was no allegation that it was improper for the Commission to proceed to hear and decide the merger applications until after completion of the antitrust case. Nor had this objection been urged in petitioner's application for rehearing or in petitioner's exceptions to the decision of the Presiding Examiner.

While petitioner sought appellate review of the Commission's orders of December 23, 1959 and February 17, 1960, *no review* was sought of the Commission's order of September 15, 1958 denying the motion of the Attorney General of California for a stay of Commission proceedings pending the completion of the antitrust case.

On October 7, 1960, petitioner filed its brief in support of the petition to review. On November 14, 1960, the Commission and El Paso (which had been granted intervention) filed their briefs in opposition.

And, on December 5th, petitioner filed its reply brief. In this reply brief, for the first time, petitioner questioned the propriety of the Commission's decision on the ground of alleged ex parte contacts between representatives of El Paso and the Commission. This contention was allegedly supported by testimony given by members of the Federal Power Commission during hearings before a House Subcommittee held in May of 1960.

In January of 1961, the Department of Justice Filed a Brief, Amicus Curiae, in Opposition to the Commission's Order.

The Court of Appeals set oral argument for January 5, 1961, which, however, was postponed until January 25, 1961.

On January 12, 1961, the Department of Justice filed a brief, as amicus curiae, and without the necessity of obtaining leave of the Court, under Rule 18(j) of that Court, since the brief was sponsored by the then Solicitor General.

The Department supported petitioner in its contention that the Commission, in making its determination regarding the public convenience and necessity, failed to weigh and to consider adequately the significance of the pending stock acquisition antitrust case.

The Department objected to the Commission's order on a further ground, which petitioner had not urged. It contended that the Commission should have stayed its proceeding pending final determination of the antitrust case. It will be recalled that in the Spring and Fall of 1958 — more than two years before — the Department through its secret and ex parte pressure on the Commission had unsuccessfully attempted to secure that result, and had failed to achieve that result in the open hearings of the District Court. Moreover, the Antitrust Division had repeatedly and at all times declined to become a party and present its views in the Commission proceeding.

The Department of Justice urged the Court of Appeals to reverse the order of the Commission with instructions either to deny the application or to stay further Commission proceedings until completion of the antitrust case.

On January 25, 1961, all of the parties and the amicus were heard during a full day of oral argument before the Court of Appeals.

Among other things, petitioner's counsel zealously and extensively argued petitioner's contentions relating to alleged ex parte contacts, which petitioner had raised for the first time in its reply brief filed with the Court in December of 1960.

At the argument, petitioner's counsel submitted to the Court the 700 odd-page transcript of proceedings before the House Subcommittee, on which its contentions purport-

edly were based. Counsel for El Paso submitted a pamphlet entitled "Resume of Relevant Matters and Extracts from Transcript of Hearings Before a Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, . . . May 10 [-24], 1960". Both of these documents were received by the Court and the pamphlet presented by El Paso has been printed in the record at JA 1367-1418. The Court requested petitioner's counsel to submit to it any additional references or extracts to which petitioner wished to call the Court's attention; and petitioner thereafter submitted such a document which is printed in the record at JA 1418-33.

In March of 1961, the Court of Appeals Affirmed the Orders of the Commission and in October This Court Granted Certiorari.

On March 30, 1961, the Court of Appeals issued its decision. The Court affirmed the order of the Commission of December 23, 1959, which had issued to El Paso, pursuant to Sections 7(c) and 7(e) of the Natural Gas Act, a certificate of public convenience and necessity to acquire and thereafter to operate Pacific's facilities, and the Court affirmed the Commission order of February 17, 1960 denying petitioner's application for rehearing and stay. (JA 1434-47).

On October 9, 1961 this Court granted the petition for a writ of certiorari. (JA 1448).

SUMMARY OF ARGUMENT

1. As the Court of Appeals properly held in affirming the Commission's orders in this case, the Commission's "course of action" in determining that the unification and integration of El Paso's and Pacific's pipeline systems was required by the public convenience and necessity under Sec-

tion 7 of the Natural Gas Act, "was its duty, well within its authority, and was a reasonable process".

The Commission's duty in this case, which was fulfilled, was to consider and weigh all of the relevant factors bearing on the public interest, to make findings based on substantial evidence, to exercise a rational judgment and to accord all parties a fair hearing during its proceedings.

The specific and detailed findings made by the Commission show that the unification of El Paso and Pacific into an integrated pipeline system will result in several important and distinct benefits to the consuming public. Petitioner's contentions to the contrary are entirely without basis.

El Paso and Pacific are economically and geographically complementary.

The integrated pipeline system will render natural gas service to the gas-hungry consuming markets of California and the Southwest and to other consumer markets in the western part of the United States, with its sources of natural gas supply at many different points, including Texas, New Mexico, the Rocky Mountain region and Canada and will thereby improve substantially the availability of new large quantities of gas to meet the existing and growing consumer demands for gas; the useful life of installed pipeline facilities also will be maximized by the connection to several sources of supply.

Integration of El Paso and Pacific also will result in more economic utilization of gas reserves since the system will be able to achieve an optimum balance of residue gas reserves and dry gas reserves; and consumer markets may be served from the most proximate sources of supply.

Consumers will benefit from the increased stimulation of exploration for and development of natural gas in western Canada and the Rocky Mountain area where there are potentially tremendous reserves, which may become available to meet present and increasing consumer demands.

The unification of El Paso and Pacific will create a financially stronger pipeline supplier than would otherwise be the case if El Paso and Pacific were to operate separately. El Paso will be able to bring financial vigor to natural gas service in the Pacific Northwest area which Pacific was unable to provide because of its serious financial and operating difficulties; and this will stimulate a more rapid growth of markets and industrial development in the Pacific Northwest and Rocky Mountain states. El Paso will be strengthened financially because of the availability of large new quantities of dry gas reserves which will enable the unified company to acquire debt capital on better terms than El Paso, whose amortization schedule for debt capital is one of the shortest in the industry because of the relatively short life of the residue gas reserves upon which it principally relies. El Paso's "cost of money" is one item of cost of service which is reflected in consumer gas bills; hence this aspect of El Paso-Pacific is another benefit to consumers.

The integration of El Paso and Pacific provides the prospect of additional service to the tremendously expanding markets in California and to the areas along the routes of the large diameter pipelines extending to California. It provides the prospect of substantial expansion and improvement of service to communities in the Pacific Northwest areas not yet served with natural gas service and improved service to existing customers.

The integration of the two pipeline systems will result in a utilization of Pacific's substantial idle capacity. Since gas can be moved in whatever direction required to meet fluctuating demands, integration of the two pipeline systems will increase flexibility of pipeline operations throughout the single system; and, new gas supplies may be connected to the system for delivery to consumers at lower capital costs than would otherwise occur.

2. As the Court of Appeals held, the Commission gave full and proper consideration to the unification's impact upon costs and rates. The Commission found on the evidence that in several and distinct ways, costs will be reduced, and the result will be a lower unit cost of transportation to all customers of the integrated system than would otherwise occur if the two companies were operated separately.

Consumer rates are a function of costs and, accordingly, unification of El Paso and Pacific provides the prospect of meaningful and direct benefits to consumers in respect of rates. Moreover, the unification would result in a deferral of substantial rate increases to Pacific Northwest customers, which, because of Pacific's poor financial condition, would otherwise have occurred; and deferral of rate increases to that area will stimulate growth of its markets because, among other reasons, gas may then be priced more competitively to other forms of fuel.

Petitioner contends that the Commission did not make a precise allocation of costs as among different segments of the unified system and therefore failed adequately to consider the rate questions involved.

The Commission and the Court of Appeals correctly rejected these contentions. No changes of existing rates to any of El Paso's or Pacific's customers were proposed; and the Commission found that the merger would result in lower total costs than the costs of the two companies, if operating separately. It held that the question of allocation of costs as among different segments of the system must await an appropriate rate proceeding, at which time the facts will be known and the extent of the benefits of unification and integration can be ascertained for purposes of proper cost allocations. The Commission imposed stringent cost accounting requirements for the unified company

so that the data which may be required in any future proceeding involving allocation questions will be available.

3. The Commision fully and carefully examined and considered the evidence relating to the merger's impact upon competition. It found that because of financial and operating difficulties which Pacific had experienced it had not been a real competitor to serve elsewhere than where certificated; and because of such difficulties and restrictions, did not promise to become a strong potential competitor.

With the presence of other substantial competitors to serve the gas needs of the markets involved, and in gas supply regions, the Commission found that the elimination of Pacific as a potential competitor would not result in any detriment to consumers and, in any event, would not result in a substantial lessening of competition. Petitioner's original and *sole objection* to the proposed merger that California was dependent on El Paso as the sole out-of-state supplier of natural gas has been since satisfied. During the last two years, two new pipeline companies, pursuant to Commission certification, have constructed large diameter pipelines to the California market.

For fifteen years, El Paso had been continually engaged in developing new projects to meet the ever-increasing demands of California and the Southwest.

In 1957 El Paso acquired the controlling stock interest of Pacific, after two years in which El Paso unsuccessfully sought to acquire Pacific's assets so that Commission approval under Section 7 of the Natural Gas Act would be required and so that the maximum benefits from unification could be achieved. Pacific was unwilling to undertake participation in a doubtlessly protracted Commission proceeding with its inherent uncertainties.

El Paso, because of its urgent gas supply problems, and the access to the great new gas reserves of the Cana-

dian and Rocky Mountain areas which Pacific could provide finally acceded to the insistent Pacific position that the transaction take the form of a stock acquisition, "quick and decisive," which all believed (including the Commission and the Attorney General) required no Commission approval.

Some nine months after El Paso undertook to acquire the stock of Pacific, an action was commenced by the Antitrust Division of the Department of Justice alleging a violation of Section 7 of the Clayton Act. The antitrust case, however, was continued in 1958 by the District Court until after "final determination" of the Commission proceedings in which El Paso proposed to acquire Pacific facilities pursuant to Section 7 of the Natural Gas Act.

Petitioner now contends that the Commission should stay its determination until after determination of the antitrust case. Petitioner contends that Section 7 of the Clayton Act takes precedence over Section 7 of the Natural Gas Act. This contention is without any basis whatsoever. The provisions of Section 7 of the Natural Gas Act and the other provisions of the Act and the extensive legislative history of both the Natural Gas Act and the amendment to Section 7 of the Clayton Act in 1950 show that Congress entrusted to the Commission the power to control and determine the existence and extent of competition, and that the Commission need consider competition as only one of several factors bearing on the public interest. Where appropriate the Commission may find competition detrimental to the public interest; or, as here unification as beneficial to the public interest. Decisions of this Court relating to the Natural Gas Act and other analogous statutes further confirm these conclusions.

A stay of Commission proceedings pending completion of the pending but continued Clayton Act case would frustrate express Congressional purpose that the Commission

regulate the operations and activities of interstate natural gas companies such as El Paso and Pacific under the specific legislative scheme for the interstate natural gas industry. Petitioner's contention would deprive the Commission acting under the Natural Gas Act of real and effective power to determine whether joint operations or integration of two natural gas pipeline companies would better serve the public interest than possible competition between them.

Petitioner would also have the proposed unification of El Paso and Pacific isolated out of the present and future continuing regulatory authority exercised by the Commission, with the possible consequence of creating new conditions (based solely on a competition standard), such as separate operation; whereas the Commission *has already found,* applying the broader standard of the Natural Gas Act, that the unification and integration of the two companies is required by the public convenience and necessity.

Petitioner seeks, therefore, to invoke a procedure which sanctions "sporadic action" and interference with the Commission's present and prospective jurisdiction — a result which this Court has condemned.

Petitioner also seeks a result which is in direct contravention of the express statutory direction of Section 7(c) of the Natural Gas Act: that proposals brought to the Commission seeking authority to construct, extend, operate or acquire natural gas facilities be set down for hearing and decided on the basis of whether such proposals are required by the public convenience and necessity.

Petitioner is precluded from contending here that the Commission proceedings should have been stayed pending completion of the Clayton Act case. Petitioner failed to urge this objection in its application for rehearing, and therefore failed to fulfill the requirements of Section 19(b) of the Natural Gas Act.

4. Petitioner's contentions that it was denied procedural due process in the conduct of the proceedings have no basis in fact or in law.

During the hearings, petitioner was afforded full opportunity to cross examine and the cross-examination which petitioner conducted was at no time precluded. Under Section 19(b), petitioner is precluded from advancing this contention because it failed to urge it in its application for rehearing from the Commission's order.

The Commission properly took official notice of another one of its proceedings and another certificate which it issued, both of which related to the construction of new pipelines for the delivery of large quantities of gas to the California market. The official notice which was taken fortified the substantial evidence in the record relating to the two new pipeline projects involved. There is no official notice issue.

Petitioner, contrary to its new and present contention, had a full opportunity to understand and try to meet the evidence and contentions of El Paso and Pacific during the hearings.

Full consideration was given by the Presiding Examiner and the Commission to the evidence presented in the Commission proceedings and there is no basis for contending otherwise, as the decisions of the Presiding Examiner and the Commission show and as the facts relating to the proceedings demonstrate.

Petitioner's unwarranted and unfounded charges of alleged ex parte communications between El Paso representatives and members of the Commission have no basis whatsoever in the sworn testimony of members of the Commission before the House Subcommittee upon which such charges are purportedly based. These charges were vigorously urged below by petitioner. The Court of Appeals rejected the charges and did not dignify them with discussion.

ARGUMENT

POINT I

In this and in all certificate proceedings under Section 7 of the Natural Gas Act, the Commission's duty was and is to consider and weigh all factors bearing on the public interest and to accord due process to all parties.

Section 7(c) of the Natural Gas Act makes it unlawful for any natural gas company subject to the jurisdiction of the Commission to

> "undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ."

It also provides that applications for such certificates of public convenience and necessity "shall be decided in accordance with the procedure provided in subsection (e) . . ." and such certificates or applications "shall be issued or denied accordingly. . . ."

Section 7(e) provides that

> ". . . a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act . . . and that the proposed service, sale, operation, construction, extension, or acquisition . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

On two recent occasions this Court has reiterated the fundamental duty of the Commission in a certificate proceeding under Section 7 of the Natural Gas Act.

In the CATCO case[1] this Court described the provisions of Section 7(e) quoted above, together with the provisions of Section 4 of the Natural Gas Act relating to rates, as constituting "the heart of the Act".

The Court held in both the CATCO case and the *Transco* case[2] that "§ 7(e) requires the Commission to evaluate all factors bearing on the public interest" (360 U. S. at 391, 365 U. S. at 8).

In the *Transco* case, the Court further construed the term "public convenience and necessity" found in Section 7 of the Natural Gas Act in the same manner as construed "in analogous statutes," and said (365 U. S. at 7-8):

> ". . . For example, in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241, the Court concluded that:
>
> > 'The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. . . .' "

The Court pointed with approval to its "previous statements that the term 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination"

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[1] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 388.

[2] *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1.

(365 U. S. at 23). In support of this statement, the Court cited the *Detroit & Cleveland Navigation* case and added this footnote:

> "Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. *E.g., City of Pittsburgh* v. *Federal Power Comm'n*, 237 F. 2d 741." (365 U. S., fn. 19 at 23)

In its *City of Pittsburgh* opinion, the Court of Appeals for the District of Columbia Circuit restated the responsibilities of the Commission in certificate cases, and the exercise of judgment required of it. The Court also and specifically referred to effects on competition as one of several public interest factors to be considered and weighed by the Commission:

> "We said in American Airlines, Inc., v. Civil Aeronautics Board:
>
> > 'The public convenience and necessity for which regulatory agencies issue certificates are the convenience and necessity of the future. The needs of yesterday require no fulfillment if they be not the needs of tomorrow. They may require recompense, but they need no regulation. Every new bus route, new airplane service, new radio station, new stock issue, new pipe line, new power project, and so on, seeks its permissive certificate upon the basis of future possibilities. * * * So the function of the agencies to which Congress has delegated these responsibilities is to examine the relevant past and present and then to exercise a rational judgment upon that data to ascertain the public convenience and necessity in the reasonably foreseeable future.' (237 F. 2d at 752)
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> * * *
>
> "Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the

> right [and duty] to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity." (237 F. 2d at 754)

These are, of course, fundamental and familiar principles which have been declared and applied in the context of analogous provisions of other regulatory statutes, e. g., *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86; *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

What this Court said in the *McLean* and *Minneapolis* cases with respect to the Interstate Commerce Commission's duty in the motor carrier field and in the railroad field, is equally applicable to the Federal Power Commission's duties under the Natural Gas Act to effectuate specific Congressional policies for the interstate natural gas industry:

> "The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action." (321 U. S. at 79-80)
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> • • •
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> ". . . Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine

> whether the proposed [acquisition] is "consistent with the public interest . . . ." ' " (The Court's brackets.) (361 U. S. at 187-88).

The very terms of Section 7 of the Natural Gas Act, as amended in 1942 impel the very same conclusions, which also are reemphasized in the deliberations of Congress prior to the passage of the Natural Gas Act in 1938, and prior to the passage of the amendment to Section 7 of the Natural Gas Act in 1942. (See pp. 186 et seq.).

No single factor bearing on the public interest, unless it should outweigh the combined impact of other factors bearing on the public interest, can be determinative of the question of public convenience and necessity. From the "complex out of which the Commission's judgment as to 'public convenience and necessity' arises",[1] "there must be a weighing of the relevant importance of the several factors involved'"[2] in "laying down new rules, to change present conditions and to guide future action."[3]

It is the Commission's duty to determine what will "satisfy the requirements of the public interest in relation to the needs of vast regions . . . in the enjoyment of [natural gas] facilities for . . . public services. . . ."[4]

Thus the first controlling principle in this case and the first criterion by which the orders of the Commission and the decision of the Court of Appeals in this case must be tested is that:

> Congress entrusted to the Commission the duty to decide what proposals relating to interstate natural gas service are required by the public convenience and necessity and such decisions are to be made

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[1] *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 467 (D. C. Cir.).

[2] *Scripps-Howard Radio* v. *Federal Communications Commission*, 189 F. 2d 677, 680 (D. C. Cir.), *cert. denied*, 342 U. S. 830.

[3] *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 440; see also *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226.

[4] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

> after a consideration and weighing of all relevant factors bearing on the public interest.

The second controlling principle and criterion of review, equally fundamental, is that:

> the Commission's duty was to accord all parties a fair hearing during its proceedings.

The third controlling principle, and applicable to the role of judicial review, was declared by this Court in the *Natural Gas Pipeline* case:

> "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbirtary result, our inquiry is at an end."[1]

The first two principles were given real and vivid application by the Commission in the proceedings which resulted in the issuance of the order and certificate authorizing El Paso to acquire and operate Pacific's facilities, whether viewed separately, or as a part of the continuing exercise of regulatory authority by the Commission over El Paso for more than twenty years and over Pacific since 1954.

As we will show in succeeding points, the Commission accorded all parties a fair hearing and it made proper findings and met all other statutory requirements.

The Commission's order, which created[2] a single integrated pipeline system, produced a sound result in the public interest and, that order, as applied to the facts

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[1] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

[2] "The duty of [El Paso] to continue its coordinated operations with [Pacific] springs from the Commission's authority, not from the law of private contracts." *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 422.

before it and viewed in its entirety, clearly does not produce an "arbitrary" result.

The Court of Appeals, which rejected petitioner's contentions that it had been denied due process in the conduct of the hearings, sustained the Commission's course of action with these words:

> "... the Commission found that the public interest would be served in several respects by the merger: The combined system would be considerably strengthened by the increase in available gas supplies; development of sources and markets would be stimulated; the merged company would be in a stronger financial position; existing gas supplies could be more effectively used to meet emergencies in periods of peak demand; and, finally, cost saving would be realized that would ultimately be reflected in lower rates. Thus the Commission weighed one set of factors against the other. It did take into account the policies of the antitrust law and put them in the scale of factors. We think its course of action was its duty, well within its authority, and was a reasonable process. We find no error." (JA 1443-44)

In its brief to this Court, petitioner entirely ignores the decision of the Court of Appeals in this regard. Petitioner also entirely ignores the detailed findings of the Commission and the Presiding Examiner.

Petitioner claims that the unification of El Paso and Pacific will not result in any substantial benefits to the consuming public. Instead, petitioner claims that the Commission and the Presiding Examiner failed to make specific findings and that the findings they did make were not supported by substantial evidence. Accordingly, in Point II we review in detail the matters the Presiding Examiner and Commission had before them and which they considered, their findings, and the evidence upon which such findings were based.

In Point III, we show that petitioner's contention that the Commission should have stayed its proceedings until final determination of the antitrust case is insupportable and without foundation in view of the comprehensive and pervasive regulatory authority exercised by the Commission pursuant to the Congressional intention expressed in the Natural Gas Act, and specifically expressed in Section 7 of the Natural Gas Act.

The foundation for our conclusion is provided in the provisions of the Natural Gas Act, in the provisions of the last paragraph of Section 7 of the Clayton Act, in the legislative history of these statutes and their amendments, and in the decisions of this Court in cases relating to the Natural Gas Act and other analogous regulatory statutes.

In Point IV, we show that petitioner is precluded from advancing its present contention that the Commission should have stayed its proceedings pending completion of the antitrust case.

In Point V, we show that each of petitioner's numerous contentions that it was denied procedural due process are baseless.

POINT II

The Presiding Examiner and the Commission had before them evidence of all "public interest" factors relating to the impact of the proposed unification of El Paso and Pacific. They considered and weighed all such factors, made specific findings based on the evidence, and exercised their rational judgment.

The Court of Appeals properly affirmed the Commission's decision.

The petitioner's contentions to the contrary are wholly without basis.

Petitioner contends that the decisions of the Presiding Examiner and Commission do not properly support their ultimate finding that unification of El Paso and Pacific was

required by public convenience and necessity, because of the absence of evidence, the absence of specific findings and the failure to give proper weight and consideration to all factors bearing on public interest.

Petitioner's numerous contentions can be divided into three categories for purposes of analysis and response:

> (1) The unification of El Paso and Pacific will result in no benefits to consumers in the areas formerly served by El Paso and "but negligible benefits" to the consumers formerly served by Pacific;
>
> (2) The Commission failed to inquire into and consider the impact of the El Paso-Pacific unification on consumers' rates; and
>
> (3) The Commission failed to give adequate weight to the impact of the El Paso-Pacific unification upon competition.

The Court of Appeals, whose opinion petitioner chooses to ignore in this Court, rejected all of these contentions. (JA 1438-44).

A. The Specific Findings Made by the Presiding Examiner and the Commission On Uncontroverted Evidence, Show That the Unification of El Paso and Pacific Will Result in Several Important Benefits to the Consuming Public.

Petitioner contends that El Paso's acquisition of control of Pacific "weakened El Paso, with no offsetting benefits to El Paso", and that the "merger resulted in but negligible benefits to the consumers of Pacific" (Pet. 48); and that "the decision omitted any basic finding as to specific benefits to the customers of the merged system". (Pet. 58; see also 28 and 57).

Petitioner contends that there was no evidence presented during the hearings or in the record to support or to prove basic findings necessary to support the ultimate conclusion of the Presiding Examiner and the Commission. (Pet. 58, 59).

We therefore recapitulate the specific findings (and exemplify the evidence upon which they were based) and the reasoning of the Presiding Examiner and the Commission relating to the public interest benefits which can be expected to result from the unification and integration of El Paso and Pacific.

In the review which follows, it will be recalled that the Commission adopted the findings and decision of the Presiding Examiner. (JA 1291, 1310). References in the text of this review are to the opinion of the Presiding Examiner and the orders of the Commission; and references in the footnotes are to the evidence in the record.

The findings of the Presiding Examiner and Commission make it evident that the total economic impact of the proposed unification of El Paso and Pacific had to be tested and evaluated in terms of the specific economic history of El Paso and Pacific, the needs of the consumers in the markets which they served, and cannot be properly isolated from the regulatory role of the Commission, in the past and in the future.

If effective Commission regulation of the operations of these two natural gas companies is to continue as Congress clearly intended, their proposed unification and integration had to be tested by the standards of the Natural Gas Act as applied to the specific facts and conditions which had already occurred and to the economic facts and conditions which as a matter of judgment could reasonably be forecast for the future.

1. *The unification and integration of El Paso and Pacific will result in public benefit in that the quantity and nature of gas supplied and available to El Paso's and Pacific's consumers will be improved substantially; and there will be a more economic and improved utilization of all gas reserves to which El Paso and Pacific, and therefore its ultimate consumers, have access.* (JA 1196-1209; 1297-1299).

To the Presiding Examiner and the Commission "of paramount importance to the decision here in relation to the public interest" was the question of the adequacy of the "natural gas supplies for the markets here involved". (JA 1196).

As found, it was "the quest for such supplies" which brought about this proceeding. "The stimulus and incentive behind this quest" was El Paso's clearly established need to continue meeting its present requirements in the California and Southwest markets and to provide a basis to help meet California's increasing demands for imported gas. (JA 1196-97).

California's own production of gas has been inadequate for years and continues to diminish. California, as of 1959, was importing two billion cubic feet of gas per day and three separate pipeline companies — El Paso, PGT and Transwestern — were, in 1959, proposing to increase California's supply by a total of another billion cubic feet of gas per day. Moreover, as found, "the demands of California for imported gas will not be permanently satisfied by this increase. . . ." (JA 1197).

The starting point of the Presiding Examiner's and the Commission's findings relating to the adequate availability of natural gas supply and its most economic use, was that

> "it is definitely in the public interest that California, and all other States served by El Paso and Pacific, have supplies of natural gas adequate to their *present and foreseeable* future needs." (Emphasis supplied) (JA 1197).

As is evident from the Presiding Examiner's opinion and the Commission's order, they were focusing on two aspects of the problem of adequacy of gas supply as it affects the public interest. The first aspect of the problem is to insure the continued availability of gas supply to meet the continuing and present needs of consumers already served, that is, to assure long and continued utilization of present system capacity upon which so many consumers now depend. Thus when El Paso delivers each day, on the average, approximately 2 billion 700 million cubic feet of gas to its markets, El Paso has to acquire a new gas supply in the same quantity if it is to "stay even". Assuming El Paso had a gas supply sufficient to fill its system requirements for a period of 10 to 15 years, unless a constant program of acquiring a new gas supply were successfully conducted, the life of gas supply available would diminish substantially; and this, of course, has been the first problem which El Paso has had to deal with over the years. (JA 1198-99, 1203, 1297-99).

As the Commission pointed out, in another El Paso proceeding, a short time prior to its approval of the merger with Pacific:

> "Additional gas is becoming increasingly difficult and more expensive to obtain because of the many purchasers competing for the available gas. It takes great diligence and skill simply to obtain enough new gas supplies to maintain the present minimum balance for El Paso's extensive system." (22 F.P.C. 900, 903 (1959)).

The second aspect of the gas supply problem arises and continues to arise from the constantly increasing consumer demands in the California and Southwest markets. The consequence is that if an attempt to meet those demands is to be made, additional large new quantities of gas are required so as to support the construction of new pipeline facilities. New demands cannot be met, however, until

sufficient new quantities of gas have been acquired to maintain a predictable long life of supply to meet present system requirements. (JA 1196-1200, 1203, 1297-98).

(a) The integration of El Paso and Pacific will result in the more economic use of gas resources.[1]

Natural gas is a wasting resource. Pipeline facilities, at great cost, must be constructed to connect the sources of supply with the cooking stoves and the fuel burners in consumers' homes and industrial plants. All interstate pipeline facilities, which are subject to the jurisdiction of the Commission and which must be certificated before they are constructed, ultimately are paid for by consumers in their rates. It is therefore essential from the consumer standpoint that the pipelines already constructed "remain in service as long as possible". (JA 1197).

> "... The long life of the pipeline is dependent upon the life of the natural gas reserves economically accessible to it. If there be an exhaustion of natural gas reserves at the receiving end of the pipeline, its usefulness is ended. Therefore, it is unquestionable that the greater the natural gas reserves economically available to an existing certificated pipeline, the longer will be its useful life to the consumers who pay for it." (JA 1197-98)

These general principles were specifically applied by the Presiding Examiner and the Commission in connection with the *El Paso-Pacific* case. El Paso's system is connected by installed pipeline facilities to the Hugoton and Panhandle Fields located in Kansas, Oklahoma and Texas.

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[1] JA 21-25, 58-60, 67-68, 76-77, 296-97, 319, 323, 378-79, Ex. 1, R 1229, JA 564; R. 2061-62; Item S-2, R. 1138, 9542-43 (all reserves available to all customers of both companies); JA 18, 22-25, 318-19, 359, 397-98, 411-12 439-40; R. 2062-64; Item U-2, R. 1138, 9851 (lengthening service life of presently certificated facilities); JA 17-18, 221-22, 303-04, 320-21, 353-54, 522, 524; Ex. 411, R. 2727, JA 1007; R. 2063; Item U-2, R. 1138, R. 9851 (access to additional reserves for future market demands); JA 57-60, 269; Item S-2, R. 1138, 9542-43 (Pacific Northwest markets can use proximate Canadian and Rocky Mountain gas sources).

They are among the oldest producing fields in this country and for years have supplied some of the largest consumer areas in the United States, in addition to the Southwest and California. (JA 1198, 1297).

El Paso draws a very substantial portion of its gas supplies from the Permian Basin. It is predominantly an oil field and has produced for about thirty years. A very substantial depletion of its gas supply occurs daily, by the takes of El Paso and three other major pipeline companies, one of which Transwestern, now supplies gas to California. The San Juan Basin, whose exploration and development were stimulated by El Paso starting in 1948, has now reached "fairly well defined limitations" except for the potential of production in the now undeveloped deeper horizons, which are highly expensive to develop. (JA 1198, 1297).

Consequently, as was found "the enormous daily withdrawals of irreplaceable natural gas from these older fields is constantly lessening their productive lives." (JA 1198).

Pacific, while connected to the San Juan Basin, also is connected to and has access to the newly explored and developing regions of Canada and the United States Rocky Mountain area. These regions, "unlike the older oil and gas fields from which large withdrawals of gas have been made over the years," have available vast supplies of gas which to date have been relatively untouched. In addition, these rugged mountainous regions hold the promise of even vaster supplies since there remain large areas which have not yet been explored or developed. (JA 1198, 1200, 1202-04).

Though Pacific's pipeline traverses the Rocky Mountain region which contains sedimentary basins that promise development of future gas reserves and Pacific is connected to and has geographical access to the gas-producing regions of western Canada, the existing and potential gas supply available to it is and will continue to be far in excess of

the gas required to serve its markets in the Northwest. (JA 1200, 1298).

The integration of El Paso and Pacific therefore, will enable the most effective utilization of Rocky Mountain gas to help meet the requirements and demands of the markets in California and the Southwest, through the use of existing but idle capacity in the Pacific line, the connecting facilities between El Paso and Pacific in the San Juan Basin and, when necessary, the enlargement of such facilities. (JA 1200, 1208-09, 1298).

Accordingly, the Presiding Examiner and the Commission found that the potentially vast reserves of Canada and the Rocky Mountain region to which Pacific has access would greatly benefit consumers by substantially aiding El Paso to meet these continuing problems:

> ". . . As set forth in our orders issuing certificates to El Paso . . . (16 F.P.C. 1354) . . . (19 F.P.C. 393) and G-12580 matters, El Paso is in need of additional supplies of gas in order to continue rendition of service to California." (JA 1297-98)
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> "There is no doubt from the evidence here that the connection of the Pacific system to that of El Paso will strengthen greatly El Paso's ability to render satisfactory natural gas service to its present markets. At the same time the total system gas supply, now available and to be expected from exploration, will be of advantage to the consumers in all the markets on the combined system. It is, indeed, in the public interest that a pipeline should have a truly adequate gas supply to meet all of its system requirements for a good number of years in the future." (JA 1203)

The use of the Canadian gas by the unified El Paso and Pacific system will result in substantial benefits to consumers in California and the Southwest, even though *physically* such gas may never reach those markets. As the

amount of Canadian gas used in the Pacific Northwest area increases, the gas more proximately located to California and the Southwest — in the San Juan Basin and the Rocky Mountain area — will become available for transmission to and consumption in such markets. Technically speaking, therefore, increased deliveries of Canadian gas at the northern termini of the integrated El Paso-Pacific system will, *by displacement,* make increased amounts of gas available to the California and Southwest markets. (JA 1200-01).

Having made these subsidiary findings, the Presiding Examiner concluded:

> "The integrated system to result from the merger is not to be regarded as a pipeline system to supply one market from one source of supply, such as supplying the California market from Canada. The unified system will have numerous markets, all of which are to be supplied from the total available system supplies of gas which may be moved in accordance with system demands. Supplies from any source may supplement those from any other source as the overall system operation may require. There will be the major sources of natural gas of both El Paso and Pacific hereinbefore enumerated, which together will constitute most substantial gas reserves with a life of considerable length. These additional reserves of gas on the Pacific system may also be drawn upon so as to conserve the sources of supply closer to California and El Paso's other existing customers. There will be an integrated pipeline system from West Texas to Canada which will be well supplied from its various sources of gas; and such system gas may be taken to any system market from the point closest thereto. A quite economical operation of the system will inevitably result." (JA 1200-01)

The Commission likewise concluded:

> ". . . As a result, there would be a pipeline system extending from West Texas to Canada, fully unified

and having many sources of supply available to serve the combined system markets, and to benefit all consumers." (JA 1298)

(b) The unification of El Paso and Pacific will result in increased exploration and development in Western Canada and in the Rocky Mountain Area.[1]

It will be recalled that in 1950 when the Commission issued the first certificate relating to the transportation of San Juan Basin gas, exploration and development in the San Juan Basin were relatively sporadic, and the Commission predicted that exploration and development of the San Juan Basin would be considerably stimulated by the construction of a pipeline outlet from this area. (9 F.P.C. at 184).

Stimulus to wildcatters and production companies is expected and occurs when a new pipeline is constructed from a new gas producing area, because it means that a market connection has been established, and there is a real opportunity to sell the gas that may be discovered and produced. (JA 1204-05).

The Commission's well-founded prediction in 1950 concerning exploration and development of the San Juan Basin has been fulfilled a thousandfold. By 1957, as a result of the intervening years' activity by El Paso and other exploration and production companies, many hundreds of billions of cubic feet of gas have been taken from the San Juan Basin; and by 1958, as the Presiding Examiner found on the evidence, the reserves available from the San Juan Basin had fairly well defined limitations, except from the deeper horizons. (JA 1198).

In 1954, when the Commission granted Pacific's original certificate, it found that "due to the lack of a market" there had been only minor exploration and development in

[1] JA 59-60, 67, 374-75; R. 326 (by linking gas fields to larger markets); 51-52, 58, 60-63, 322, 463-64 (Pacific not in a position to stimulate development); 25-26, 58-60, 136, 375 (merged company to carry on greater exploration).

the three large sedimentary basins in the Rocky Mountain region located in Colorado, Utah and Wyoming. The Commission found that "the 'development of this potentially productive area will be retarded unless stimulated by a market outlet.' " (JA 1203-04).

The construction of Pacific's line did stimulate exploration and development in these areas, but not as much as could have been expected, because of the disappointing rate of growth in the Pacific Northwest markets and the availability to Pacific of an overabundance of gas supply, particularly after its connection with Canada. (JA 1204, 1298).

The integration of El Paso and Pacific with the consequent attachment of El Paso's markets should, as the Presiding Examiner and the Commission found, provide further stimulus for exploration and development both in the Rocky Mountain area and in Canada. (JA 1204-05, 1298).

As the Presiding Examiner found, it is reasonable to anticipate that new production of gas will be made available "to any market on the integrated system" and ". . . will be a great inducement to expend funds for the exploration and development of natural gas . . . which will be of benefit to all consumers in the markets to be served by the merged system". (JA 1204, 1298).

The stimulation of exploration and development of the potentially productive areas of Canada and the Rocky Mountain region, which will be provided by the unification of El Paso and Pacific, is "greatly in the public interest". (JA 1204).

(c) The unification of El Paso and Pacific will increase substantially the quantities of dry gas available for delivery to the California and Southwestern markets and thereby assist substantially in alleviating the residue gas problem.

The proven reserves of dry gas wells have a substantially longer life than the proven residue gas reserves of oil wells and hence the addition of substantial new dry gas reserves will enable El Paso to lengthen the amortization period of its bonds, which is dependent upon the length of life of reserves, and help reduce "the cost of money" which is reflected in rates charged to consumers.[1]

In his opinion, the Presiding Examiner reviewed the facts relating to and the limitations upon the use of residue gas, which we have already described at pages 6-7, 19-21, supra. He repeated the conclusion, reached on many earlier occasions by the Commission, that residue gas "must be made available to the consuming public as a conservation measure. . . ." (JA 1207, 1299).

Since the gas to which Pacific has access is primarily dry gas (more than 90%), the Presiding Examiner and the Commission found that as dry gas deliveries are increased through the merged system, several consequences beneficial to the consuming public would result. (JA 1207-08, 1298-99).

The delivery of dry gas can be turned on or shut off at will, and as such, can be used in accordance with the needs generated by fluctuations in oil production. Thus greater dependability of continuous delivery to all classes of customers will be assured. (JA 1207, 1299).

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[1] JA 26-27, 31-32, 316-17; Item S-2, R. 1138, R. 9530 (residue gas and dry gas defined). JA 30-31, 33-35, 219-21, 377-78. Item S-2, R. 1138, R. 9530, 9533; Item U-2, R. 1138, R. 9843 (high percentage of residue used in El Paso System); JA 27-34, 219-21, 297-98, 316-17, 319-20, 377-78, Ex. 2, R. 1229, JA 621-22 (difficulty in marketing additional residue without additional dry gas); JA 32-33, 35, 135-36, 220, 297-98, 317, 319-22, 377, 407, 409-11, 426 (Pacific's access to large dry gas reserves provides needed balance and increases ability to use more residue gas otherwise wasted); JA 30-31, 317-18, 321-22, 378 (El Paso short amortization period on debt capital due to dependence on residue gas).

Additional supplies of dry gas will enable the entire system to absorb an even greater quantity of residue gas from the Permian Basin and other sources. Thus, greater conservation will be effected and increased supplies of gas will be made available to meet increased consumer needs. (JA 1207).

Because of the wide fluctuations in the amount of residue gas available at different times of the day, on different days of the month and in different seasons, excess capacity must be provided in the pipeline facilities to enable a maximum take of residue gas. With the availability of dry gas reserves and the ability of the merged system to move gas in whatever direction may be required, otherwise idle pipeline capacity will be utilized. (JA 1206-08).

The life of the average oil well is from 12 to 14 years, whereas the average dry gas well has a much longer life. Because El Paso markets such a high percentage of residue gas, the estimated life of El Paso's reserves is low compared to that of other pipelines. (JA 1208).

The short amortization schedule on El Paso's bonds (which exceed $800,000,000 in amount) is tied to the life of its gas reserves. Accordingly, as the Presiding Examiner found, because the merged system will acquire large quantities of dry gas to which Pacific's facilities provide access, "El Paso will be able to show in the future a considerably longer life for its natural gas reserves and it will be able to market bonds of longer maturity, thus reducing its financing expense" (JA 1208). "Financing expense" or "cost of money" is one element of the pipeline's "cost of service" which is directly reflected in the rates paid by ultimate consumers. (JA 1208, 1299).

The Commission summarized its and the Presiding Examiner's findings relating to the highly beneficial impact of the merger with respect to the utilization of residue gas:

> "There is a further problem that is mitigated by the proposed transaction. El Paso's principal sources of supply are in the Permian Basin area where large

volumes of gas are produced in conjunction with oil. Because of variations in the production of oil, due to local regulation, it is necessary to supplement the residue gas sources with dry gas. On the other hand, Pacific's supply is primarily dry gas. Thus El Paso, which now has the greatest dependence upon residue supplies of any natural gas company, will reduce its dependence upon the vagaries of oil production. This in turn, through better scheduling of supplies, will aid conservation, lengthen life of reserves, and assist El Paso in marketing bonds having a longer maturity life." (JA 1298-99)

2. *The unification of El Paso and Pacific will result in the creation of a financially stronger pipeline supplier, which will redound to the benefit of consumers.*[1] (JA 1209-15, 1299-1301).

The Presiding Examiner and the Commission found that the unification of El Paso and Pacific will result in the creation of a financially stronger pipeline supplier: that Pacific's poor financial condition, which seriously impaired its ability to perform its public service function adequately, would be obviated; that El Paso's financial position would not be impaired and would be strengthened due to its ability to attract capital upon more favorable terms.

The "true situation" with regard to Pacific's financial position, as the Presiding Examiner found, was that "Pacific simply was not in a position, when its stock was acquired by El Paso, to conduct a vigorous plan or program to bring abou truly effective natural gas service for the area adjacent to its pipeline system". He found that "El Paso

[1] JA 40-41, 52-55, 62-63, 97, 110-11, 120, 394, 448-49, 466-68, 504-06, 525 (Pacific's poor financial results). JA 44, 51-52, 374, 447-48; Ex. 15, R. 1229, R. 3228 (Pacific not adequately staffed for future); JA 41, 57, 62-63, 114, 120-21, 214-15 (difficult for Pacific to provide expanded service); JA 41-42, 63, 67-68, 114, 121-22, 160-61 (merged system's ability to finance extensions and connect new markets); JA 42, 94-100, 109-13; R. 207-08 (the merger would enable a more favorable acquisition of debt and equity capital than would otherwise occur); JA 41, 54-56, 62-63, 97-98, 110-11, 113, 120, 470-71, 501-02, 509-11; R. 264 (Pacific faced serious obstacles in raising any additional capital).

will be able to conduct such a program for the Pacific area upon the accomplishment of the merger, and financial vigor will be needed in the prosecution of such a program". (JA 1210).

He found that the estimates presented to the Commission in 1954 of Pacific's prospective markets "have been proven by experience to be quite high" and that this produced several consequences. First, Pacific was unable to make a full utilization of the capacity of its pipeline. Second, "the inadequate markets failed to produce sufficient revenues to make funds available for truly effective operation of Pacific's extensive system". Third, this situation required Pacific to operate with an insufficient number of personnel and to minimize expenditures for operations and maintenance. Fourth, even with this type of operation, Pacific lost more than $2 million during the year 1957, its first full year of operations. (JA 1210).

Pacific's sales of gas in 1957 were about $3 million less than estimated revenues as shown in the initial tariff it filed in 1956 with the Commission. Moreover, its sales of natural gas by-products were about $3,400,000 less than anticipated. (JA 1211).

Estimates available at the time of the hearings in this merger proceeding indicated that, in 1958, Pacific would have operating losses of about $1,500,000. (JA 1211).

Thus, as the Presiding Examiner said:

> "Without counting the exact dollars related to Pacific's distressed financial condition, it is well established by the record evidence that Pacific's sales and resulting revenues were well below the estimates of them and were indeed insufficient for the operation of the company business of rendering a public service. It was found necessary to curtail expenditures for the development of Pacific's natural gas acreage, as required by some of its leases, and to provide for gas needs into the future. Capital ex-

penditures could not be made for the expansion of Pacific's markets, and segments of the public are thus deprived of natural gas service.

"Further detailed discussion of Pacific's financial shortcomings is deemed to be unnecessary; and it is enough to say that Pacific did not have the financial capacity to render the type of service to its markets that should be expected of an interstate pipeline company. It is safe to conclude also that while Pacific might have ultimately survived to become a financially healthy concern, the progress to that end would have been indeed quite slow if Pacific had continued to make its struggle alone." (JA 1211-12)

Taking into account El Paso's strong financial position and its ability to bring financial vigor to Pacific's present and future operations, the Presiding Examiner found that the improvement of Pacific's financial position by reason of the unification of the El Paso and Pacific systems, would benefit substantially all consumers in the Pacific Northwest:

"This merger of the two companies into a financially strong natural gas company cannot fail to bring very much earlier to the Pacific Northwest that type of natural gas service to which it is entitled as a part of the gas consuming American public." (JA 1212)

The unification of El Paso and Pacific would also result in the more favorable acquisition of debt and equity capital than would otherwise be possible. The Presiding Examiner found that the evidence established that "Pacific would have found it very costly, if not impossible, to obtain debt and equity capital to finance the necessary expansion of its system in the near future" (JA 1213). Pacific's Mortgage Indenture prohibited the issuance of additional bonds until 1959 and subsequent years and only if Pacific were able to meet certain earnings tests. These earnings

tests, as the Presiding Examiner found, Pacific could not meet. (JA 1213-15, 1299).

El Paso's borrowing position will be considerably improved by reason of its connection with the dry gas reserves to which Pacific has access for the reasons already noted. In this respect, therefore, El Paso will be strengthened financially and in a way which will benefit consumers in the market areas of California and the Southwest. (JA 1214, 1299).

Pacific's financial difficulties will not impair El Paso's financial position. (JA 1214, 1300). Pacific's operations were relatively small as compared to those of El Paso's and, as the Commission said in its summary of the Presiding Examiner's findings:

> "While some of the testimony indicates that Pacific's low earnings may be somewhat of a handicap for several years, this would appear to be temporary and would disappear when greater use is made of Pacific's pipeline. . . ." (JA 1299-1300)

In sum, and as found, the merged company would be able to attract debt and equity capital readily and upon quite favorable terms; and both Pacific and El Paso would be in a stronger financial position after the merger than before, and "this inures to the benefit of the consuming public." (JA 1214-15, 1299).

With respect to Pacific's $23 million of tax loss carryforwards generated during 1954-1956, the Commission conditioned its order and certificate upon a requirement, which it found would inure to the benefit of consumers, that the merged corporation "establish and maintain a special reserve upon its books of account in such amount as shall equal the amount of all tax savings resulting from the merger, less the amount which could have been realized by Pacific if there were no merger." (JA 1300-1301).

3. ***In several distinct and important ways, the unification and integration of El Paso and Pacific will result in expanded and improved gas service to all of the areas in which they operate.*** (JA 1208-09, 1215-22, 1224, 1301-03).

The Presiding Examiner's findings, which the Commission adopted, were that the unification and integration of El Paso and Pacific would result in five distinct and substantial types of benefits, relating to present and future gas service, which are in the public interest:

> (a) it provides the prospect of additional service to California and to areas along the route of the large diameter pipelines which will extend to California (JA 1215-18, 1301);
>
> (b) it provides the prospect of substantial expansion and improvement of service to Pacific's present customers (JA 1218-19);
>
> (c) it will enable fuller utilization of the Pacific pipeline system (JA 1219-20, 1301);
>
> (d) it will increase the flexibility of operations throughout the entire unified and integrated system (JA 1220-22, 1301-03); and
>
> (e) it will enable the connection of new gas supplies to consuming markets at lower capital costs than would otherwise occur (JA 1208-09, 1224).

(a) Additional Service to California[1]

The Presiding Examiner found that the demands of the California market "will continue to expand for all of the foreseeable future", and that despite the three new projects of El Paso, PGT and Transwestern to deliver an additional billion cubic feet of gas per day to California (to make a

[1] JA 18, 38-39, 120, 297, 318, 320-21.

total of 3 billion cubic feet per day), within five or six years the requirements of the California market "will only be met by great quantities of additional imported natural gas" (JA 1215-16).

The Presiding Examiner observed that the "needs for gas for a market cannot be learned of one day and supplied the next day", and that planning is required of the pipeline, such as El Paso, and its customers which "must look to the future needs of . . . its markets". (JA 1216).

He concluded that "El Paso, as one of the suppliers of gas to the California market, must be continually planning to meet the future needs of this great market and all of its other markets" (JA 1216).

The Presiding Examiner found "with certainty" that "Pacific, as an independent corporation, would not soon be in a position to propose new projects to supply California" because of its financial difficulties and the more urgent need to develop its markets in the Pacific Northwest area. (JA 1217).

He referred to the PGT and Transwestern projects and then made these significant findings:

> "The importance of adequate supplies of gas to meet the present and future requirements of the California market can hardly be over-emphasized. As the demands of this market increase with the passing years, El Paso and other natural gas companies will compete for the business. It has been pointed out hereinbefore that the evidence shows that El Paso cannot presently offer to increase its daily deliveries of gas to this market by any great quantities without accessibility to additional sources of supply. The accessibility of the additional sources of supply on the Pacific system will become a reality with the merger.
>
> "El Paso will then be in a position to present to the Commission new projects for supplying additional gas to California, and each such presentation may be examined by the Commission for economic

> feasibility. Furthermore, it may be assumed that El Paso would have a contract with a California customer, obtained after competition with others, before seeking to obtain from the Commission a certificate authorizing additional sales in the California market. . . .
>
> ". . . California will be benefited by these proposed new supplies of gas and California customers will have, under the Act, the right to participate in any proceeding for certificate approval from the Commission of any such sale of additional gas in their State. These things being true, it is definitely in the public interest that California have available to it the additional sources of gas supply of the merged company." (JA 1216-17)

New projects to transport and deliver to the California market large additional quantities of gas by large diameter pipelines will also benefit the many markets along the routes of such pipelines, as has been the case during the last 15 years throughout the Southwest as El Paso has expanded its deliveries to California. Thus, the Presiding Examiner found "all of El Paso's present customers may receive the same benefits" and "the ratio of benefits to the general economy of one State as compared to another might well be in proportion to its consumption of natural gas". (JA 1218).

(b) Benefits to Pacific's Present Customers[1]

The unification and integration of El Paso and Pacific will create, as the Presiding Examiner found, a natural gas system in which sources of gas supply will be "scattered along the system [and] . . . from each of which gas will be flowing into the system". Since normal operations

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[1] JA 41, 62-63, 120-21, 213-15, 465-66; R. 1857 (Pacific unable to undertake extensions); JA 42, 67, 121-22, 464-65 (El Paso financial and other strength to stimulate market development); JA 39-40, 144-46, 394, 416-19; R. 339-51, 1670 (El Paso will serve every community within economic reach); JA 38-40, 47, 68, 323, 418-19 (large diameter pipelines to California will result in lower unit transportation cost to consumers in states through which they will pass).

will result in each source of supply furnishing "gas to the markets closest to it", this, as the Presiding Examiner found, most significantly "should necessarily result in a lower unit transportation cost for gas" not only to the Pacific Northwest area, but "to all markets on the system". (JA 1218-19).

The Presiding Examiner found that many communities in the Pacific Northwest area not now served with natural gas will benefit from the merger. Pacific would have been unable to finance and construct any new extensions until its financial difficulties had been resolved. In contrast, El Paso, which had a continuing proven record of providing natural gas service to every community within economic reach of its system, would be able to fulfill the same assurances which it made to public officials of the states in the Pacific Northwest area:

> "El Paso has given assurance that if the merger is consummated it will be its policy to give natural gas service to every community within economic reach of the unified system. This will be of considerable benefit to the area traversed by Pacific pipelines, in which are a considerable number of unserved communities large enough to make feasible such service to them. It may be taken for granted that El Paso, being prudently managed, will extend its service to every community in which profitable sales of gas may be made. El Paso has the financial ability to accomplish these extensions promptly upon completion of the merger." (JA 1219)

(c) The Fuller Utilization of the Pacific System[1]

The Presiding Examiner found that the Pacific system had considerable idle capacity as a result of the construction of pipelines with capacities "indeed too high" to meet unrealized but originally estimated market demands. He

[1] JA 47, 50-51, 120, 208, 419-20, Ex. 337, JA 805-06, Ex. 338, R. 1229, JA 809-10; Ex. 347, R. 1229, JA 856; Item 1-3, R. 1262, JA 1067-70; R. 13841-42, 13845-46 (Pacific idle capacity); JA 47, 67-68, 119-20, 322-23 (better use of Pacific facilities by merged system).

found that utilization of this idle capacity would by extension of Pacific's facilities to presently unserved markets in the Pacific Northwest area and by the connection of the Pacific system to the El Paso markets. (JA 1219).

He pointed out that gas distribution utilities, the principal customers of the pipelines, "do not blindly buy their supplies. . . . They are interested in the unit cost of transportation . . . so that they may know that a rate proposed to them will not have soon to be increased because based on an uneconomic use of pipeline capacity." Therefore, prospective customers will "more readily seek service from the unified company when there begins the more economic use of the capacity of the Pacific system"; and the elimination of the idle capacity in the Pacific system will benefit system consumers by the reduction of unit transportation costs throughout the system. (JA 1220).

The Presiding Examiner found that if El Paso and Pacific were to remain separate corporations, Pacific's idle pipeline capacity "would not nearly so quickly disappear"; and that the merged company will be in a better position to increase sales more quickly. (JA 1220).

The Presiding Examiner thus found that it "is quite obvious that it is in the public interest that Pacific's idle pipeline capacity be quickly eliminated". (JA 1220).

(d) Flexibility of Operation[1]

The El Paso pipeline facilities are so constructed that gas can be moved in either direction, that is, the flow of gas may be reversed at any time depending upon operating needs. As the Commission found, "comparatively minor piping facilities at Pacific's existing compressor stations would enable gas to flow in either direction in the existing Pacific system". (JA 1302). "Comparatively minor increased interconnecting facilities in the San Juan Basin

[1] JA 25, 35-39, 47, 72-73, 77-80, 135, 250, 298, 319, 321, 380-82, 410, 427-29, 492-93; Ex. 1, R. 1229, JA 564; R. 1995.

would permit gas to flow directly from Pacific into the existing El Paso facilities connecting San Juan with the California markets". (JA 1302).

The essence of "flexibility" is that "by central control of the operation of the entire unified system, the flow of system gas may be directed at all times to points of need on the system". (JA 1220-21, 1302).

The flexibility of the unified and integrated system will have significant consequences for ultimate consumers. As already described, a better balancing of dry gas and residue gas will be achieved and when, at the varying times of day or night, week or month, when residue gas deliveries decrease, the "swings" on dry gas deliveries may be accomplished without difficulty and with minimal expense. (JA 1205-08).

The supplies available on the Pacific system, particularly from the Rocky Mountain area, can be used to supplement El Paso's present supply for its Permian Basin—San Juan—Topock, Arizona pipelines or through the available connections southward to the Permian Basin—Blythe, California pipelines (see Map, Appendix B). In a similar manner, gas may move north from El Paso's present system to supplement Rocky Mountain or Canadian supplies in cases of emergency. (JA 1221, 1302).

Thus, the availability of an alternate source of supply to meet any shortage resulting from an interruption of service which might occur between the wellhead and the point of consummation, can assure continuous and uninterrupted delivery to consumers. (JA 1220-21, 1303).

Further, "with natural gas entering the system at so many points, the flow of gas to any particular market or customer may be increased or decreased with greater facility; and larger temporary demands on one source of supply may be readily relieved by a supplemental supply from another source". (JA 1221).

This flexibility of operation, as the Presiding Examiner found, "could not be accomplished to any appreciable ex-

tent by cooperation between two separate corporations". (JA 1221, 1302). As the Presiding Examiner said,

> ". . . separate natural gas companies have given assistance to each other in situations of emergency where their pipelines were connected; but there are other periodically occurring situations than the true emergency, which could be quickly and easily handled by having such flexibility of operation, attainable only through central control of operations. This flexibility of operation is clearly an advantage in rendering proper service to the gas consuming public". (JA 1221-22)

In reaching the same conclusion and in emphasizing the growing importance of flexibility of operation in El Paso's and its ultimate consumers' future, the Commission said:

> ". . . we cannot appraise the proposed merger from a narrow viewpoint but must look to the future when gas supplies north of El Paso's present system become more important as Permian and San Juan reserves decrease and when additional facilities are built to provide free movement of gas north and south". (JA 1303)

(e) The Unification of El Paso and Pacific will enable the connection of new gas supplies to consuming markets at lower capital costs than would otherwise occur.[1]

For several reasons, the unification and integration of El Paso and Pacific will provide the basis for construction of new pipeline facilities at a lower capital cost than would otherwise be possible. Pacific "has gas reserves in relative abundance with an inadequacy of markets for the sale of them. The Pacific pipeline is at present not operating nearly at full capacity. . . ." (JA 1208-09). Thus, with proper connection to El Paso facilities, Pacific's surplus capacity "may indeed be used to make gas available to the markets with the greater needs". (JA 1209).

[1] JA 36, 318-19, 378-79.

Moreover, the "combined El Paso-Pacific system will not be a mere supply line from one area of gas production to a single state market, with only the consumers of that market to pay the costs of construction, operation, and maintenance of such supply line". The Presiding Examiner found that this "contemplated integrated system of El Paso will, in time, have markets along a large portion of its pipelines, with several sources of gas supply well spaced along the system, so as to make no particular market pay for any long hauls of gas". Consequently, natural gas may be made available to ultimate consumers of the unified system "at lower capital cost". (JA 1209).

B. The Presiding Examiner and the Commission Fully Considered the Impact of the El Paso-Pacific Unification and Integration Upon Rates. They Concluded That Operation of the Unified System Would Result in a Lower Unit Cost of Transportation to All Customers Than Would Otherwise Occur.

They Found That Only After the Unified System Was Operating and the Benefits to the Various Customers Were Ascertained, Could Proper Allocations of Costs, and Therefore Precise Fixing of Rates, be Made.

El Paso Proposed no Rate Increase as a Result of the Merger and Agreed that no Rate Increase Would be Sought for at Least One Year With Respect to the Pacific Portion of the System.

The Commission Imposed Strict Conditions for Cost Accounting on Each Segment of the Integrated System so as to Enable the Commission and All Interested Parties to Have Available the Necessary Data for Use at Such Time as the Allocation of Costs May Arise in the Future.

Petitioner claims that the Presiding Examiner and the Commission did not have before them evidence relating to the impact of the El Paso-Pacific unification on costs and rates; that they failed to consider such impact which

is allegedly detrimental to California and that such impact was not accorded its proper weight in the determination of the public convenience and necessity.

1. *The unification of El Paso and Pacific will result in lower costs and rates than would otherwise occur. The Commission gave full consideration to costs and rates.*[1] (JA 1222-25, 1303).

In our review of the Presiding Examiner's and the Commission's specific findings relating to the various public interest benefits, we have noted the various ways in which there will be reductions of costs, e.g., lower financing expenses as a result of an increase of the life of reserves by the addition of large quantities of dry gas; construction of supplementary facilities at lower capital costs than would otherwise occur; strengthening of the financial position of Pacific; the utilization of Pacific's idle pipeline capacity; and improved flexibility of operation which will enable the integrated company to supply each of its markets from the most proximate source of supply.

Rates are a function of costs. It was found that total costs of the merged system would be, in several respects, substantially less than the total of costs of the two companies operating separately. Therefore, as the Presiding Examiner and Commission concluded, the unification of El Paso and Pacific will produce a lower unit cost of transportation to all of the customers than would occur otherwise. (JA 1223-25).

The Presiding Examiner and the Commission made additional findings relating to other matters which will contribute to this result.

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[1] JA 36, 319, 378 (proximate incremental reserves can be attached at lower capital cost); JA 318, 321, 378-79 (avoids capital expense of an El Paso line duplicating Pacific's); JA 42-45, 47, 62-63, 168, 170, 172-73, 251, 397, 444, 454-56, 505, 523-24 (potential increases in Pacific's rates will be deferred and reduced); JA 43-44, 70-76, 80-81, 98-100, 161-63, 236, 250, 269, 321, 480-86, 489-91; R. 172-73, 945-49, 1995, 2014-46, 2048, 2050-51, 2393, 2416-19 (savings will result from the elimination of duplication of facilities and activities); 38-40, 47, 67, 321, 323, 419, 464-65 (lower unit cost of transportation).

It was found that savings in cost would result from the elimination of duplication of service and administrative functions carried on by the two separate companies. The "evidence shows clearly that substantial savings in the costs of operation may be effected by the joint operation of the two systems." The Presiding Examiner concluded that it was unnecessary to determine the "exact dollar amounts expected to be so saved". (JA 1223-24, 1303).

With respect to rates charged to Pacific customers, it was found that the merger would result in a deferral of any increases for at least one year and that increases which might be sought thereafter would be less than if Pacific were operating as a separate company. In this regard, several subsidiary findings were made on the evidence. (JA 1222-23, 1303).

Pacific was faced with an unusual dilemma. It had to raise rates in order to increase revenues. It also had to increase its sales to increase revenues. However, the more it increased its rates, the less likely it would be able to increase its sales:

> "The importance of increasing the number of Pacific's customers as soon as practicable, in order to better its presently unsatisfactory financial condition, has been shown herein. Any fuel user must be convinced that it is to his interest to shift from the use of another fuel to the use of natural gas, or to install facilities originally for the use of gas. One obstacle to so convincing the fuel user would surely be a present or prospective higher price for natural gas. Therefore, Pacific has had a serious problem in trying to better its financial position by obtaining more revenue from additional customers without deterring its prospective customers with higher rates." (JA 1222)

On August 6, 1957, Pacific had made a rate filing with the Commission. (JA 1222-23, 1303).

But, as the Presiding Examiner observed:

> "It was the unanimous opinion of past and present officers of Pacific, who appeared as witnesses, that it would have been necessary for Pacific to file for even higher rates than it is now collecting if it had continued as an independent company. Pacific was likewise prepared to file for still greater rate increases in order that it might become a sound and substantial company." (JA 1223)

The Presiding Examiner found that such an additional rate increase for Pacific "would have been necessary to meet the earnings requirements for any further financing by Pacific as an independent company" and that such a rate increase "would unquestionably have retarded the expansion of Pacific's markets". (JA 1223).

In his testimony during the hearings, El Paso's President gave the assurance that no new rate increases to Pacific's present customers would be filed with the Commission for at least one year. (JA 1223, 1303).

The deferral of a rate increase to Pacific's customers was found by the Presiding Examiner to be of great significance:

> "This would be quite important to the expansion of the markets of Pacific, and any deferral of rate increases is in the interests of the consuming public. Pacific, as a separate corporation, could really not afford such a deferral of rate increases. Furthermore, during this period El Paso will be carrying on promotional activities and extending facilities to increase the customers and revenues in the Pacific markets." (JA 1223)

It is, therefore, evident beyond question that the Commission fully considered and evaluated the economic impact of the unification of El Paso and Pacific and, particularly its impact upon costs and prospective rates. Moreover such consideration resulted in the indisputable finding on the

evidence that the costs of the integrated system will be substantially lower than the costs which would otherwise be incurred by the operation of El Paso and Pacific as two companies and this result, of course, is very much a benefit in the public interest.

It is indeed prophetic, though by no means surprising that more than 25 years ago, in 1935, the Federal Trade Commission advised Congress in one of its reports (which are specifically referred to in Section 1(a) of the Natural Gas Act) that:

> "Provided that the consuming public is adequately protected by a governmental regulatory body in such matters as rates and services, the effect of joint ownership may be materially beneficial to the public generally, in that the gas reserves available for certain markets may be increased, the wasteful duplication of investment in several competing lines may be avoided, and the possibility of making lower prices to the consumer is greatly increased.'"[1]

2. *The Commission fully considered and made proper and adequate provision for the determination of possible future questions relating to the allocations of costs among customers of the merged system.*[2] (JA 1225-28, 1303-05).

At the outset of the section of its order relating to "rate questions," the Commission stated that:

> "The strongest motive for attacking the presiding examiner's decision seems to be the fear that the cost of service will continue to be high for gas originating on the present Pacific system and the cost differential will be imposed on El Paso's customers in California." (JA 1303)

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[1] FTC Final Report, No. 84-A, p. 255 (1935) in Sen. Doc. 92, 70th Cong. 1st Sess. (1928).

[2] JA 42-45, 170, 172, 351-52, 383-87, 396-97, 440-43; Ex. 19, R. 1229, R. 3565.

The Commission fully considered and answered this and the related contentions.

It held, along with the Presiding Examiner, that "the merger will result in savings that will tend to lower rates or prevent them rising more than they would otherwise". (JA 1303).

In accordance with the evidence and with the Presiding Examiner's findings, the Commission found that "the merger will not of itself result in any rate change, and El Paso does not propose to make any change in its filed rates or Pacific's filed rates as a result of the merger".[1] (JA 1225-26, 1303).

In consequence of these findings, the Presiding Examiner and the Commission properly concluded that the effect of the merger on specific rates to specific customers was not before it and would "necessarily have to be settled in another proceeding". (JA 1226-27, 1303).

California and PG&E contended that the merger would inevitably result in a shift of costs from Pacific to El Paso's California customers, that is, that there would be a "rolling-in" of Pacific's costs which would affect all of El Paso's present customers. The Commission rejected these contentions, properly holding that the "issue of allocation, of course, is one for a rate proceeding. It is a matter for our judgment based upon all the facts before us concerning the operation of the merged system."[2] (JA 1227-28, 1304).

The Commission did, however, impose more stringent accounting requirements than those imposed by the Presiding Examiner. As a condition of its order and certificate, the Commission required El Paso to account for and al-

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[1] On January 1, 1960, after the merger had been consummated, El Paso reissued in its own name and without change all of Pacific's tariffs and service agreements with its customers. (JA 1339).

[2] See *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 646 (D. C. Cir.), certiorari denied 356 U. S. 959; *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372, 387 (8th Cir.), certiorari denied, 352 U. S. 967; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433, 439 (D. C. Cir.).

locate not only all of the direct costs incurred by each segment and portion of the integrated system "but all costs as between the present El Paso and Pacific systems and as between three portions of Pacific's system". (JA 1304).

"In this way", said the Commission, "the costs arising on the Pacific system will be readily identifiable by the parties and by us in a future rate proceeding, and the requirement will facilitate the allocation of system-wide costs and the designing of rates that will do justice to all customers".[1] (JA 1304).

The Commission specifically reserved the opportunity to decide what method of allocating costs or designing rates would be used in any future proceeding.[2] In any event, it could not do otherwise. In each rate proceeding the Commission is required under Sections 4 or 5 of the Natural Gas Act to determine whether the rates or proposed rates are "just and reasonable" on the facts before it. The facts necessary to make fair allocations of costs—and therefore precise rates to different customers—cannot be finally known until the time of such a proceeding. (JA 1226-27, 1304).

It was appropriate, therefore, for the Commission to observe that any attempt to impose an allocation formula "would be improperly prejudging the evidence in such a proceeding. . . ." (JA 1304-05).

In its order of February 17, 1960 denying petitioner's application for rehearing, (JA 1353-58) the Commission reiterated and elaborated its valid findings and proper holdings relating to costs and rates:

> "We understood, as can be seen from our prior order, that El Paso's operations would be changed

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[1] On January 4, 1960, and in accordance with the Commission order of December 23, 1959, El Paso filed a "Manual of Accounts Designed to Show Costs of Pacific's System Separately From the Over-All System of the Merged Company Necessary to Provide Data in Future Rate Cases to Show Separately the Cost of Service Assignable to Pacific's System" (JA 1311-37).

[2] See *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d, 372, 387 (8th Cir.), certiorari denied, 352 U. S. 967.

as a result of the merger. In fact, we approved the merger because, among other advantages, we believed that it would make available to El Paso additional supplies of gas and increased flexibility of operations. These are physical results that are not part of the merger transaction itself, although the merger would encourage and assist in bringing them about. Approval of the merger transaction was justified because of the advantages which would flow from it, so that it was not necessary to determine the allocation of costs on the combined system at the time of approving the merger.

"Although not a direct result of the merger transaction, shifts in cost or changes in rates might or might not come about as a result of the physical changes. However, the exact effect of the changed operations on allocation of costs to the several customers of the combined system has not been shown nor could it be shown at this time. That question will be considered if it comes before us, for example, upon the filing of new rates by El Paso. We shall then necessarily have to make an allocation, and we shall do so in a manner to distribute fairly the costs of the combined system. We may say further that in making such an allocation we will not be bound rigidly by a preconceived method. That is we shall not uncritically permit costs to follow methods of operation that we believe would unfairly and unnecessarily shift costs from one group of customers to another.

"To assist us in any future proceedings and as a result of requests made by El Paso's California customers, we provided in our order that El Paso should maintain supplemental accounts designed to show the costs separately for various segments of the Pacific Northwest System and separately for the former El Paso System and the former Pacific Northwest System. In this way all parties to the proceeding and this Commission would have more easily available some of the necessary data on which to base a just allocation of costs and rate determination." (JA 1354-55)

The Court of Appeals, also in clear and certain terms, properly rejected petitioner's contentions relating to allocations of costs and rates.

In concluding its discussion of these matters, the Court of Appeals held:

> "Under our regulatory system, rates depend in large part on costs. If a merger must inevitably result in higher costs, this is a critical factor to be weighed in determining the public interest in the merger. Of course, if the merger creates new benefits for consumers, higher costs may be justified to some extent. Allocations of costs as between the two underlying systems may be an eventual factor in a rate case. The Commission [with the conditions in the order] protected that eventuality. The forecasts of both the Examiner and the Commission in the case at bar were that costs would be lessened in the long run.
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> "In sum, we think an inquiry into specific future rates was not required. Inquiry into the effects of the merger upon future costs, and thus perhaps ultimately upon future rates, was one of the factors to be weighed in evaluating the public interest in the merger. The Commission made such an evaluation, and we think it is sufficiently supported. We are of opinion that the contention of California on this point cannot be sustained." (JA 1440-41)

We submit that the decisions of the Presiding Examiner, the Commission and the Court of Appeals regarding allocation of costs and rates were correct and that accordingly, petitioner's contentions in this regard should be rejected.

C. The Commission Fully Considered and Evaluated the Impact of the Merger of El Paso and Pacific Upon Competition.

It Found That the Elimination of Pacific as a Potential Competitor Would Not Result in a Substantial Lessening of Competition and That in Any Event, the Various Benefits to the Consuming Public Outweigh Any Possible Advantage of the Competition Pacific Might Afford if It Were Operated as an Independent Company.

Throughout its Statement and in portions of its Argument, petitioner contends, in essence that the Commission failed to consider adequately and to evaluate the evidence relating to the merger's impact on competition; that the Commission made erroneous findings on the evidence concerning that impact; and that an allegedly proper evaluation of the evidence and the merger's impact on competition would compel a finding that despite the other benefits to consumers, the Commission could not find that the El Paso-Pacific unification was required by the public convenience and necessity. (See Pet. 31).

We deal with these contentions in this subsection of our brief.

The second of petitioner's present contentions, which we treat in Point III of this brief, is that allegedly the Commission improperly proceeded to hear and determine the question of whether the unification and integration of El Paso and Pacific were required by the public convenience and necessity under Section 7 of the Natural Gas Act prior to a determination by the District Court of the question whether El Paso's acquisition of Pacific's stock may have violated Section 7 of the Clayton Act.

1. *As the Court of Appeals held, the Commission properly fulfilled its duty to consider and weigh the impact upon competition in this case and the Commission properly exercised its judgment.*

Petitioner alleges that "there is substantial *evidence of record* that the acquisitions of Pacific's stock and facilities was part of an overall plan aimed to suppress competition both in the California market, and in the Rocky Mountain and Canadian gas fields." (emphasis supplied) (Pet. 32). There is *no* such evidence in the record.

As the Presiding Examiner found, in greatly expanding its interstate natural gas transmission facilities and its business operations, El Paso has been under continuing Commission regulation including prior certification of each new project, and continuous rate regulatory control. (JA 1192).

The record in this case and the public record of many Commission decisions through the years, shows in clear and convincing terms that El Paso's program has been to seek to meet the continuing and expanding demands for natural gas of consumers throughout the Southwest and California; that the full measure of the abilities and energy of its management and personnel have been directed to solving the various problems which relate to successful achievement of the objective of assuring to consumers continuous dependable and expanded natural gas service at just and reasonable rates; and which efforts, if successful, redound to the benefit of the stockholders of the company. (JA 1190, 1192-93).

Presumably, petitioner makes its summary allegation relating to El Paso's alleged plan to suppress competition upon petitioner's "version" of certain events which petitioner purportedly describes in its statement of the case. However, in each series of events it describes in its statement of the case and in its argument, petitioner either totally misrepresents to this Court the facts as shown by

the evidence or fails to support its allegations by reference to any facts in the record. Throughout, petitioner ignores completely the findings of the Presiding Examiner and the Commission which were affirmed by the Court of Appeals.

Petitioner concedes that "assuming it to be proper [for the Commission] even to entertain an application by interests accused of having violated the antitrust laws", then "it is clear . . . that [the Commission has] some duty to" consider "the national antitrust policy as bearing upon questions arising before it under Section 7 of the Natural Gas Act." (Pet. 31).

Petitioner contends that in the light of the alleged evidence of El Paso's alleged plan to suppress competition and the alleged "express finding by the Commission that its administrative blessing was sought primarily to avoid prosecution by the government under the antitrust laws", the Commission could not have found, as is required by Section 7(e) of the Natural Gas Act, that El Paso "was 'able and willing . . . to conform to the provisions of the Natural Gas Act. . . .' " (Pet. 32).[1]

The short answer to the foregoing contentions is that the Presiding Examiner and the Commission considered

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[1] It should be observed that petitioner's present contention that El Paso was unable to conform to the provisions of the National Gas Act was not urged in petitioner's application of rehearing nor at any other previous time.

The Presiding Examiner stated in his opinion:

> "As hereinbefore pointed out, there being no question about the ability and willingness of El Paso to acquire and operate properly and lawfully the facilities of Pacific, the one remaining question for determination here is whether, under all the evidence, the proposed merger 'is or will be required by the present or future public convenience and necessity.'" (JA 1178).

Petitioner did not question this finding in its exceptions to the decision of the Presiding Examiner nor did petitioner object to this finding (which was adopted by the Commission) in its application for rehearing.

Accordingly, under Section 19(b) of the Natural Gas Act, petitioner cannot properly urge this objection in this Court.

and weighed the effect of the pendency of the antitrust case; they had before them extensive evidence relating to the impact, if any, of the merger upon competition; and they weighed and considered, as one factor, in determining the public interest, the consequences of the elimination of Pacific as a "potential competitor". (JA 1178-79, 1183-95, 1295-97).

The Court of Appeals correctly held that the Commission had fulfilled its duties well; the Court in this regard concluded its discussion of this aspect of the case in these words:

> "This brings us to consider what the Commission had to say in respect to the antitrust laws. The Commission took note of the terms and policy of the Clayton Act and stated its own responsibility under that Act and under the Natural Gas Act. It concluded that the elimination of Pacific as a potential competitor was not significant for two reasons: First, because of Pacific's poor financial condition it could not be considered a serious competitor to El Paso in California; and, second, there was in prospect substantial additional competition for El Paso in the expanding California market. Beyond this the Commission found that the public interest would be served in several respects by the merger: The combined system would be considerably strengthened by the increase in available gas supplies; development of sources and markets would be stimulated; the merged company would be in a stronger financial position; existing gas supplies could be more effectively used to meet emergencies in periods of peak demand; and, finally, cost saving would be realized that would ultimately be reflected in lower rates. Thus the Commission weighed one set of factors against the other. It did take into account the policies of the antitrust law and put them in the scale of factors. We think its course of action was its duty, well within its authority, and was a reasonable process. We find no error." (JA 1443-44)

2. *The Presiding Examiner properly defined the duty to consider and to weigh impact on competition as one of the several factors in determining public interest.*

Reflecting the extensive testimony and evidence, cross-examination and argument during the hearings and in the briefs relating to "antitrust" and "competition" considerations, the Presiding Examiner discussed such matters extensively in his well reasoned opinion.

He first took express cognizance of the action by the Department of Justice against El Paso and Pacific in the District Court in which it was alleged that El Paso's acquisition of Pacific's stock violated Section 7 of the Clayton Act; of the last and exemptive paragraph of Section 7 of the Clayton Act; and of the order of the District Court dated October 13, 1958 continuing the trial of the antitrust case until final determination of the merger proposal before the Commission. (JA 1175-79).

He properly held that "the specific authority of the Commission to approve or disapprove the proposed merger, depending upon its effect upon the public interest, is derived from the Natural Gas Act." (JA 1178).

On the basis of the foregoing, he properly and perceptively concluded:

> "Among these factors [to be considered by the Commission] is whether the evils sought to be prevented or restrained by Section 7 of the Clayton Act, are found by record evidence to be present here, and to be such as to render inimical and repugnant to the public interest the merger here sought to be approved. This is not to say that the Commission must here determine whether there is technically a violation of the Clayton Act under the facts here established; it has no jurisdiction so to determine.[1] It is, however, the unmistakable duty of the

[1] As the Presiding Examiner and Commission held, and as we elaborate in Point IV, the fact that the Commission has not been entrusted by Congress with the duty of deciding whether a particular transaction violates the antitrust laws does not indicate that Congress intended that Commission regulation under the Natural Gas Act should give way to the Clayton Act, where the matter involved, as here an acquisition of facilities under Section 7(c) of the Natural Gas Act, comes with the jurisdiction of the Commission.

Commission to consider such evils to whatever extent they may be shown by substantial evidence to result from the merger of Pacific into El Paso, and to weigh them carefully in relation to the public interest, so as to make a truly fair determination of whether, in spite of their presence, there are other factors shown to exist, which preponderate in establishing that the merger 'is or will be required by the present or future public convenience and necessity.' This would be true even in the absence of any pending action taken under the Clayton Act.

* * * * *

"... The amendment [to Section 7 of the Clayton Act], in effect, places Congressional reliance upon the Commission, acting under the Natural Gas Act, not to approve an acquisition of assets the effect of which would be 'substantially to lessen competition, or to tend to create a monopoly,' unless in the carefully exercised judgment of the Commission the acquisition would nevertheless be in the public interest. Therefore, the transaction here must be carefully examined to determine whether any lessening of competition or creation of monopoly shown by the evidence to result therefrom, is such that Commission authority for the consummation of the transaction should be denied, regardless of all other factors and considerations however favorable to the approval of the transaction.

"The courts have most definitely held that the antitrust laws, including the Clayton Act, express a national policy which opposes interference with free competition. But this is not a blind policy to be followed regardless of its detriment to public interest in certain circumstances. It is not so ironclad a policy that it cannot be varied when it becomes obstructive of benefits to the public interest.[10] In the amendment of 1950 to Section 7 of the Clayton Act, making inapplicable its provisions in the presence of Commission authority for the consummation of the transaction, the Congress has recognized that the national policy against interference with free competition must not be a blind policy. The Congress

has given to the Commission, in the Natural Gas Act, the authority to approve the acquisition of the assets of another such company by a natural gas company subject to the Commission's continuing power to regulate and supervise, and this continuing power indeed constitutes a protective shield against the evils of monopoly. This is particularly true in view of the legal presumption that this agency of Government will properly and lawfully exercise this power in the public interest." (JA 1178-81)

"To McLean Trucking Co. v. U. S., 321 U. S. 67; Chicago Board of Trade v. U. S., 246 U. S. 231; and City of Pittsburgh v. F. P. C., 237 F. 2d 741."

The Presiding Examiner's conclusions followed the teachings of this Court in the decisions which he cited and several others. In *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. at 98, the Court said:

> "What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry[1]. . . ." (See also 346 at 91-93, 97.)

More recently in the *Minneapolis Railroad* case, this Court held:

> "Even though . . . acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest. . .
>
> "As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in

[1] See pp. 190 et seq. for the matters which influenced Congress to make specific provision for the interstate natural gas industry.

> 'the public interest'. A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. 'As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws. . . .' "[1]

Petitioner, ignoring the plain meaning of the last and exemptive paragraph of Section 7 of the Clayton Act (see pp. 223 et seq.), contends that the *McLean* decision is inapposite because of the express provision in the Motor Carrier Act (Section 5(11)) relieving transactions consummated with the approval of the Commission from the operation of the antitrust laws. (Pet. 35). But, the Court there stated specifically:

> "The history of the development of the special national transportation policy suggests, *quite apart* from the explicit provision of § 5(11), that the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way." (321 U. S. at 83)

Moreover, as we shall see in the discussion in the following point, in the *Penn Water* case which involved the Federal Power Act, there were no explicit provisions in that Act, or in any of the antitrust laws, providing an exemption from the antitrust laws in respect of any transactions consummated or carried on in pursuance of an order of the Federal Power Commission and relating to matters within the jurisdiction of the Commission under that Act. In that situation, as in this, the extent to which the two companies involved were and are required to continue their coordinated or integrated activities did not spring from the authority of private contracts "legalized" by the Commission but from the Commission's authority

[1] *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173, 187 quoting from *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86.

under the Federal Power Act and the Natural Gas Act, respectively.

3. *The Presiding Examiner properly rejected various contentions relating to alleged "antitrust" matters.*

In his consideration of the "antitrust" aspects of this case, the Presiding Examiner took into account the fact that El Paso's filing on August 7, 1957 of an application to merge with Pacific pursuant to Section 7 of the Natural Gas Act, "was 'considerably stimulated by the fact that the Attorney General of the United States was prepared to file an antitrust suit. . . .' " (JA 1183, 1293).

The Presiding Examiner also considered the "frank admission by El Paso's President of the 'high probability' of an adverse decision in the civil action" if El Paso's application to the Commission were denied. That "admission" was simply a recognition of the fact that if the Commission were to find that unification and integration of El Paso were *not* in the public interest, defense of the antitrust suit would be extremely difficult. Indeed, the converse of that statement is that if the Commission were to find the merger in the public interest, the antitrust suit could not be maintained, was a conclusion which counsel for the Antitrust Division conceded during hearings in the District Court. (See pp. 102-103, supra).

The Presiding Examiner had before him contentions made by the Attorney General of California and the Staff of the Commission that El Paso's acquisition of Pacific added to El Paso's size and that size was an " '. . . earmark of monopoly . .' ". But the Presiding Examiner viewed the issues before him as issues to be decided under the public interest standards of the Natural Gas Act and in rejecting such contentions said that "this great size should not be permitted to bring awe into the picture here so as to distort the views of one giving consideration to the issues".

He pointed out, among other things, that El Paso had supplied "greater and greater quantities of gas" to the California market "*always with authority from the Commission*" and that "it was performing a service to California customers *under regulated rates*". (emphasis supplied, JA 1192-93).

4. *The Presiding Examiner's and Commission's inquiry was properly directed to the ultimate question of whether these should be two separate and independent companies or one unified and integrated company.*

The Presiding Examiner took into account the pendency of the antitrust action, and its possible effect if the Commission were to conclude that the unification of El Paso and Pacific was *not* in the public interest; he took into account the unwillingness of El Paso to attempt to maintain control of Pacific if the Commission were to find that such unification were not in the public interest; and he took into account the duty entrusted to the Commission under Section 7 of the Natural Gas Act to render a meaningful determination of the public convenience and necessity. He posed the issue before the Commission in terms of one unified and integrated company or two separate and independent companies:

> "Either El Paso becomes the owner by merger, and the controlling operator, of all of Pacific's facilities, or El Paso and Pacific will exist henceforth as two entirely separate and independent corporations; and what they, dealing with each other as such, might accomplish in the public interest is highly problematical." (JA 1184)

It is clear beyond question upon the face of the decisions of the Presiding Examiner and the Commission, and the opinion of the Court of Appeals, that the Presiding Ex-

aminer and Commission appropriately considered this case in its fullest aspects:

> Was joint control and operation of El Paso and Pacific required by the public convenience and necessity?

5. *The Presiding Examiner gave thorough consideration to competition matters. He made extensive and detailed findings.* (JA 1185-95, 1215-18).

Before proceeding to consider the evidence and facts relating to "impact on competition" and to make findings on such facts and evidence, the Presiding Examiner observed:

> "The United States District Court of Utah has postponed the trial before it of the civil action in which El Paso and Pacific are charged with a violation of the Clayton Act, until the final determination by the Commission of the question of whether the proposed merger is in the public interest. This action indicates a decision by the Court that the Commission should have the first opportunity to examine carefully the transaction here, particularly in relation to any lessening of competition or creation of monopoly which may result therefrom, and weigh such factors in relation to the public interest before determining whether Commission authority should be given, pursuant to the Natural Gas Act, to consummate the transaction. Such factors are given primary consideration in relation to the issue here of whether this merger is in the public interest." (JA 1184-85)

The Presiding Examiner then divided his discussion and findings relating to competition into two groups: competition for markets; and competition for natural gas supply.

(a) Unification of El Paso and Pacific will not substantially lessen competition among pipelines who supply market areas.[1]

After reviewing the evidence relating to Pacific's negotiations with Edison, the Presiding Examiner found that Pacific was not "at any time a real competitor for a share in the California market". (JA 1186).

Turning to *potential* competition, the Presiding Examiner made these findings:

> "Hereinafter are discussed the financial difficulties encountered by Pacific in the construction and commencement of operation of its pipeline; and it may be found definitely that Pacific, standing alone as a separate corporation, did not have the financial capacity to compete seriously for any share in the California market". (JA 1186-87)

It will be recalled among many other things relating to Pacific's poor financial position and its difficulties, that Pacific's mortgage indenture precluded Pacific from undertaking any new financing until at the earliest 1959, and thereafter only at such times as earnings tests could be met. (JA 1213-15, 1299).

In contrast to the "certainty that Pacific, as an independent corporation, would not soon be in a position to propose new projects to supply California" (JA 1217), the Presiding Examiner found that the unification of El Paso and Pacific would assure continued efforts by the merged company to formulate new proposals to serve

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[1] JA 133, 242-48, 261-62, 278-79, 376, 445-47, 457-61, 468-70; R. 354, 1871-72 (prior to acquisition, no actual or potential competition between the two companies, except as to California market; Pacific not a real competitor for California market); JA 40-41, 50-58, 62-63, 97, 110-11, 113, 120, 214-15, 394, 447-49, 466-68, 470-71, 501-06, 509-11, 525; R. 2108-09 (Pacific's poor financial position and its difficulties); JA 11, 46, 133-34, 137-38, 147-48, 200-03, 270, 304-06, 405-06, 415, 475-76, 531; Ex. 1, R. 1229, JA 564; Ex. 83, R. 1229, JA 715, 719, 721-22 (Transwestern Pipeline Company); JA 11-12, 46, 131-33, 137-38, 146-49, 174-81, 248, 270, 308, 376, 418; Ex. 1, R. 1229, JA 564; Ex. 29, R. 1229, JA 700-01, 707-08 (Pacific Gas Transmission Company).

California's increasing demands, which proposals would be submitted to the Commission. (JA 1186-87, 1192, 1216-17).

He found that "as the demands of this [the California] market increase with the passing years, El Paso and other natural gas companies will compete for the business" but, "the evidence shows that El Paso cannot presently offer to increase its daily deliveries of gas to this market by any great quantities without accessibility to additional sources of supply." El Paso's accessibility to such additional sources of supply "will become a reality with the merger". (JA 1217).

El Paso would then be in a position in a competitive context "to present to the Commission new projects for supplying additional gas to California". (JA 1217).

The Presiding Examiner found on the evidence that Transwestern and PGT were strong potential competitors of El Paso to serve the increasing demands of the California market. He pointed out that the Commission on August 10, 1959 had issued a certificate of public convenience and necessity to Transwestern; and that PGT had filed its application which, if the Commission were to find it in the public interest, made it "quite possible that instead of one, California will now have three suppliers of out-of-state gas, even after Pacific becomes extinct." (JA 1187-88, 1191-92, 1296-97).[1]

He found that even though the PGT application had not then been acted upon "it is certain that a strong competitor is now seeking to enter the California market. . . ." He found that PGT would be a "direct competitor with El Paso" for the sale in the central and northern California markets "of Canadian gas or gas from the Rocky Mountain area". With respect to Transwestern he found that its

[1] On August 10, 1960 Transwestern began deliveries of gas to California through its new large diameter pipeline facilities. On December 8, 1961, PGT began its deliveries to California.

ability to add capacity of 290 million cubic feet per day will make Transwestern a "strong competitor" for sales to the Southern California Companies and PG&E. (JA 1191-92).

In summary, the Presiding Examiner found:

> "It may be safely concluded that both Transwestern and PGT will offer considerably greater and stronger competition to El Paso than Pacific could possibly have offered as a separate corporation, and the competition from these two companies will be immediate rather than several years into the future. The public interest will not be hurt by the elimination of Pacific as a competitor for natural gas sales in California or elsewhere." (JA 1192)

He made these further significant observations and findings:

> ". . . the Commission may find at any time that it is required by the public convenience and necessity that some additional qualified applicant be granted a certificate giving authority to transport and sell additional natural gas to the California market. Thus, the elimination of Pacific as a possible competitor for the California market appears to do no violence to the public interest. Furthermore, Section 7(g) [of the Natural Gas Act] prevents a monopoly of any market by a natural gas company except when approved by the Commission as being in the public interest; and the rates for sales of natural gas in the monopolized territory may be reduced by the Commission if they be unjust or unreasonable in violation of the Act.
>
> "While El Paso has substantial markets elsewhere, its main market is, and has been for years in California. It will find competition there to be keener for a long time than in any other of its present markets, or in any present market of Pacific. The California market is quite apparently the prize for which competing natural gas companies now strive in the western United States. This is true

because of the great growth of California in recent years and its anticipated growth in the future, in population, commerce and industry". (JA 1188-89)

(b) The elimination of Pacific as a competitor for natural gas supply will not substantially lessen competition and will have no adverse impact upon the public interest.[1]

The Presiding Examiner found that Pacific as an independent company would definitely be a competitor of El Paso in areas such as Canada and the San Juan Basin, but that Pacific was not and could not be expected to be a competitor of El Paso in the Permian Basin or in the Panhandle or Hugoton Field. (JA 1194, 1297).

However, the Presiding Examiner found that "the elimination of Pacific as a competitor for the purchase of gas in the producing fields is not of great consequence when there remain other strong competitors[2] for gas in all producing fields to which the unified company will have access". (JA 1195).

He found that the elimination of Pacific as a potential competitor for natural gas supply "will do no real harm to the public interest" particularly in the light of the fact that despite regulation of natural gas producer rates, competition among pipelines for natural gas supply and other factors have tended to increase producer prices. (JA 1195).[3]

6. *The Commission properly concluded that the public convenience and necessity did not require the existence of Pacific as a pipeline competitor.*

On "all of the evidence", the Presiding Examiner said that "it must be found that any lessening of competition

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[1] JA 23, 135-37, 140-41, 149, 259-61, 308-09, 334-36, 338-43, 412-13, 424-25, 472-80; R. 569, 1160-62, 1320-27, 1383-87, 1420.

[2] Transwestern, PGT, Southern Union, Colorado Interstate, Mountain Fuel Supply, other American companies and quite a number of Canadian companies which sell gas both to Canadian purchasers and to natural gas companies of this country at various eastward points along the Canadian border. (JA 1194-95, 1297).

[3] See p. 73, fn. 1, supra.

. . . by reason of the elimination of Pacific as a competitor, does not create any obstacle to approving the merger of Pacific into El Paso". (JA 1195).

Weighing the factor of impact on competition, and exercising his judgment, the Presiding Examiner concluded that the benefits to the public were of greater importance and "indeed far outweigh this single factor of the elimination of Pacific as a competitor of El Paso or any other natural gas company". (JA 1195).

Upon review of the Presiding Examiner's decision, the Commission summarized the matters relating to Pacific's inability to afford immediate or substantial competition in the California market because of its financial difficulties; and the prospect of additional and substantial competition to be afforded by Transwestern and PGT. Also, it reviewed the situation relating to competition for a natural gas supply. (JA 1296-97). And, the Commission considered and rejected contentions advanced by petitioner and the Staff.

The Commission exercised its judgment and held

> " . . . What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the Clayton Act, but we are required to consider the bearing of the policy of the antitrust laws on the public convenience and necessity. *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 754 (CADC). With the presiding examiner, we find that any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. . . ." (JA 1295-96)

The Commission found further that "in any case, it appears that any lessening of competition [as a result of the merger] is not substantial". (JA 1296).

7. ***Petitioner's contention that the Commission is incompetent to consider problems relating to competition in the interstate natural gas industry misconceives entirely the Commission's function and duty, as Congressionally entrusted to it in the Natural Gas Act.***

Petitioner vigorously contends that the Commission is wholly without competence to consider matters relating to competition or effects on competition among interstate natural gas pipelines. (Pet. 37-39).

The opinion of the Presiding Examiner and the orders of the Commission show the patent absurdity of such contention.

It is the Commission which best can bring to bear on the problems involved its long experience and familiarity with the varied and technical problems relating to pipeline operations and problems, gas supply, and effectual fulfillment of market needs. It is best qualified to pass on, and exercise knowledgeable judgment with respect to such questions as: what companies are capable of rendering the type of natural gas service required; how competition operates in the various phases of the natural gas industry; what type of competition is desirable or undesirable from the public interest standpoint; what will be the impact on consumers if different types of competition are permitted; and to what extent competition should be stimulated or restrained.

And, since it is the Commission which must pass on each new natural gas proposal and since it is the Commission which must continually review and regulate rates, the appropriate forum to consider and analyze questions relating to competition or effects on competition among natural gas pipelines subject to the Natural Gas Act is the Commission.

As we show in Point III, Congress explicitly imposed upon the Commission the duty to consider all of these types of questions and to bring its experience and expertise to

bear in solving them in a manner best suited to further the public interest. Congress specifically imposed upon the Commission the power to control the existence and extent of competition and to consider all of its aspects in terms of the special and peculiar problems of the natural gas industry and effective natural gas service to the public, all part of the Commission's overall and pervasive regulatory control of the interstate natural gas industry under the Natural Gas Act.

In this case, as the Court of Appeals properly held, the Commission fulfilled its Congressionally imposed duty under Section 7 of the Natural Gas Act to consider and make proper findings supported by the evidence relating to the merger's effect on competition, and then to weigh and judge this factor together with all those material to the question of the public convenience and necessity.

POINT III

The Commission properly proceeded to conduct its proceedings and render its decision without awaiting final determination of the pending, but continued, antitrust case.

We deal in this section of our brief with petitioner's present contention that the Commission erroneously failed to stay its proceedings in the merger case pending final determination of the antitrust case in the District Court.

In the following section, Point IV, we show that petitioner is precluded from raising this objection under Section 19(b) of the Natural Gas Act and for other fundamental reasons.

There are several facets and many contradictions in petitioner's argument. (Pet. 28-39). Essentially it boils down to the insupportable contention that the situation involved here is one which calls for the invocation of a doctrine of "primary antitrust jurisdiction" based on a

notion, in this case, of primacy of Section 7 of the Clayton Act.

The sole basis of the argument is that Section 7 of the Natural Gas Act does not confer express power to the Commission to determine the lawfulness of the sale of stock control of a pipeline company subject to the Commission's jurisdiction under the Act.

Petitioner's argument finds no support in any other facts, in any statutory provisions, in any expression of legislative intention, or in any decisions of the courts relating to the Natural Gas Act or to other analogous regulatory statutes.

Petitioner contends that to effectuate alleged congressional intention, the Clayton Act is paramount to the Natural Gas Act in a situation where the stock acquisition was followed by a proposal to merge the two companies pursuant to Section 7 of the Natural Gas Act; and that, therefore, a determination under the Clayton Act in respect of El Paso's acquisition of Pacific's stock was required before the Commission could act on the merger proposal.

This argument ignores entirely the existence of Section 7(c) of the Natural Gas Act and the important powers entrusted to the Commission under that statutory provision to determine the lawfulness of the construction, operation or acquisition of natural gas facilities, as an essential element in the congressional scheme for regulation of the interstate natural gas industry. Petitioner would replace the broad standard of "public convenience and necessity" found in Section 7 of the Natural Gas Act with the narrower standard provided in the Clayton Act, that of impact on competition.

Under the procedure proposed by petitioner, the mere invocation of the Clayton Act would preclude the Commission from even determining the public convenience and necessity. And if the Clayton Act were successfully invoked, the Commission's determination of public convenience and necessity could be nullified.

Petitioner would require the Commission to stay its proceedings in every instance where any proposal under Section 7 of the Natural Gas Act—to construct new natural gas facilities, to extend existing facilities, to operate facilities, or to acquire facilities—was attacked by the Department of Justice (or presumably the Federal Trade Commission),[1] on the grounds that it allegedly violated one or more of the antitrust statutes. Petitioner therefore seeks to invoke an impossible result. It would only stimulate the "warring" between various arms of the Government of the United States as to which is primarily responsible for protecting the public interest in the natural gas industry, when it is quite clear that the continuing duty and responsibility has been vested by Congress in the Federal Power Commission.

At the same time, the gas-consuming public and the private companies seeking to conduct their business by meeting consumers' needs would suffer the resulting squeeze. This "squeeze" is no abstract notion. The Antitrust Division unsuccessfully sought to achieve it in this case.

Petitioner's contention would place mechanics over substance. There is no basis for any contention that the Commission's consideration of a proposal to merge the facilities of two natural gas companies would have to be stayed by the Commission, because such proposed merger was under attack in the Courts on antitrust grounds. Accordingly, a proposal to merge which was preceded by the intermediate step of a stock acquisition, should have no different result.

Petitioner disregards entirely the three possible allocations of responsibilities as between the Natural Gas Act and the Clayton Act. Any one of these possibilities is far

[1] Petitioner does not seek to explain what the Commission should do if a private litigant or a state agency, rather than a federal agency, accused El Paso of violating Section 7 of the Clayton Act and how there is any difference in the nature of an accusation by a federal agency which alters the Commission's duty under Section 7 of the Natural Gas Act to hear and decide the proposal brought to it.

more reasonable in this situation than petitioner's contention. In view of the Commission's order finding the unification of El Paso and Pacific required by the public convenience and necessity, the issue as to which of the three possible allocations of responsibility is the correct one, is not here. They do, however, lend further perspective:

> (1) The Commission must take account of the factor of impact on competition as only one of several factors; and may find in particular cases that increased competition is detrimental to the public interest. The sole standard of antitrust decision is impact on competition. In the light of the continuing and comprehensive regulatory control exercised by the Commission over the two natural gas companies, and *despite the absence of Commission power to decide the lawfulness of the stock acquisition*, any action the District Court might take based on a competition standard to alter conditions would be "sporadic action" which would upset or interfere with the effective and continuing exercise of Commission future regulation over future rates and services of such companies.
>
> (2) Or, as has been suggested by the Commission's recent show cause order to the Humble Oil and Refining Company, the Commission does in fact have power to regulate the sale of stock control of a natural gas company subject to its jurisdiction, because such sale is in substance the "acquisition of natural gas facilities" within the meaning of Section 7 of the Natural Gas Act.
>
> (3) Or, if the Commission were to find that a proposed merger preceded by a stock acquisition was *not* in the public interest under Section 7 of the Natural Gas Act, then the Clayton Act might be invoked as supplementary or secondary to the Natural Gas Act in respect of the stock acquisition.

Petitioner correctly asserts unequivocally in one portion of its brief that Section 7 of the Natural Gas Act "imposes upon the Commission a positive duty to conduct hearings upon applications thereunder". (Pet. 61).

However, in arguing its doctrine of "primary antitrust jurisdiction", petitioner seeks a mandate from this Court directing the Commission not to carry out this duty explicitly imposed upon it in Section 7(c) of the Natural Gas Act.

Petitioner ignores the fact that the proposal to unify and to integrate the facilities of El Paso and Pacific is no different in character than a proposal, also covered by Section 7 of the Natural Gas Act, to construct new pipeline facilities to serve all of the consumer markets in which El Paso and Pacific operate in that both are brought to the Commission as a proposed means of improving or expanding natural gas service to consumers. In a case involving the certification of construction of new facilities, the Commission's object is to expand natural gas service on an economically feasible basis, and at just and reasonable rates. The objective of the proposed unification and integration and the result which the Commission found would occur, is the improvement and expansion of existing natural gas service to the markets in the western states and the assurance of increased and more dependable service, at just and reasonable rates.

Petitioner ignores the fact that, just as with a certificate authorizing the construction of new facilities, the certificate El Paso sought and received was *to operate* Pacific's facilities as part of a unified and integrated system; that El Paso's *duty* is to continue such operations; that it is unlawful for El Paso to do otherwise, unless the Commission were to permit abandonment under Section 7(b) of the Act on the grounds of the public convenience and necessity or the unavailability of a natural gas supply.

In sum, petitioner's contention would, as the Court of Appeals held, have the consequence of relegating to the Commission an illusory power under Section 7(c) of the Natural Gas Act and would thwart the congressional scheme for regulation of the interstate natural gas industry.

If, however, petitioner's contention amounts to nothing more than a plea that the Commission would have been aided by the judicial expertise in competition matters, the indisputable answer is that the Commission is competent to decide questions of impact on competition in the natural gas industry, and the duty to do so has been imposed on it by Congress.

In consequence of all the foregoing, the only possible result is that to whatever extent Section 7 of the Clayton Act may be applicable to El Paso's acquisition of Pacific's stock, when the proposal to unify and integrate El Paso and Pacific was brought to the Commission for its determination under Section 7 of the Natural Gas Act, the Commission properly proceeded to conduct its hearings and to determine whether the proposal was required by the public convenience and necessity, without awaiting determination of the antitrust case.

Had the Commission done otherwise, it would have denied El Paso and Pacific their rights to such a determination, and it would have denied the public's right to such a determination. Had the Commission delayed its proceedings until after final determination of the antitrust case, it would have foreclosed or delayed interminably[1] the oppor-

[1] We agree with petitioner when it contends that delays in regulatory proceedings do not assist the effectuation of the public interest. Just as delay in the judicial process is the defeat of due process, delay in regulatory proceedings can only defeat the business interests of the private companies seeking to provide service, and defeat the public interest, particularly with respect to natural gas service to consumers which require such service to fulfill basic household fuel needs and to industrial and other consumers which require it to fulfill their energy requirements.

We point out that there was more than a year's delay between the filing of the applications before the Commission and the commencement of hearings on the proposed unification of El Paso and Pacific. We also point out that, ironically in three respects, petitioner without a shred of justification, accuses El Paso (see p. 261, infra) of engaging in ex parte communications to members of the Commission for the purpose of speeding this case along:

(1) Petitioner complains of the regulatory delays in rate proceedings as defeating the public interest, but makes no mention of delay in certificate proceedings;

(2) The Antitrust Division repeatedly exerted secret pressure upon the Commission to delay the Commission proceedings indefinitely until completion of the antitrust case;

(3) El Paso and Pacific urged the Commission to consider and decide the case promptly. It did so in a motion filed with the Commission and served upon all the parties to the proceedings, and in the oral argument before the Commission.

tunity to improve and expand natural gas service to millions of consumers throughout the West.

The foundation of these conclusions comes from three sources: *First*, the relevant statutes, which are the Natural Gas Act and Section 7 of the Clayton Act; *Second*, the relevant legislative history of those statutes and their amendments, which show the legislative purpose regarding Commission control of the existence and extent of competition in the interstate natural gas industry; and, *Third*, the decisions of this and other courts relating to the Natural Gas Act and other analogous regulatory statutes.

A. Congress Specifically Entrusted to the Commission the Regulation and Control of the Existence and Extent of Competition as Part of Its Delegation to the Commission of Powers to Effect Pervasive and Comprehensive Regulatory Control Over Interstate Natural Gas Pipeline Facilities and Operations.

The relevant history of legislative interest in the regulation of the interstate natural gas industry spans more than thirty years. That history includes a mammoth inquiry which Congress in 1928 directed the Federal Trade Commission to undertake; the completion of that inquiry by the Federal Trade Commision in 1935; the enactment by Congress in 1935 of the Public Utility Holding Company Act and the Federal Power Act; the enactment in 1938 of the Natural Gas Act and the enactment in 1942 of an important amendment to Section 7 of the Natural Gas Act; and the enactment in 1950 of an important amendment to Section 7 of the Clayton Act.

If there can be any doubt that Congress intended to entrust to the Commission the power to regulate and control the existence and extent of competition among interstate natural gas pipelines as a vital element in the totality of the Commission's comprehensive regulatory power over such pipelines, the review of the history of relevant Congressional enactments must eliminate any such doubt.

1. ***At Congressional direction, the Federal Trade Commission conducted an extensive inquiry which lasted from 1928 to 1935.***

Section 1 of the Natural Gas Act states in part:

> "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." (52 Stat. 821)

Senate Resolution 83 (70th Cong., 1st Sess., 69 Cong. Rec. 3054) was adopted on February 15, 1928 and directed the Federal Trade Commission ("FTC") to conduct a broad inquiry into the activities and operation of public utility corporations engaged in the interstate electrical energy and gas business, and holding companies owning the stocks of such corporations. The FTC was directed to report its findings and recommendations to Congress, and, among other things, to report whether any of the practices studied "tend to create a monopoly, or constitute violation of the Federal antitrust laws."

(a) FTC Report 73-A

On January 28, 1935, the FTC submitted its voluminous final report covering electrical utility companies and holding companies. In the concluding section of this report, the FTC stated that it had conducted a study of the activities and operations of the most important interstate natural gas pipeline companies and companies engaged in local distribution. It said that upon completion of a study of natural gas production, which it believed important, it

would submit to Congress such further conclusions and recommendations as it deemed appropriate relating to the natural gas industry. It said, however:

> "So far as the Commission feels able to express an opinion at this time about the natural-gas situation, which involves special and extraordinary problems of regulation, its principal conclusions are: (1) that the major feature of the problem is the proper conservation of natural gas through Federal action, which begins with the control of gas-well drilling and the other primary activities of gas production; and (2) that pending formulation of Federal conservation policy and of methods of control for the entire business, the Congress may well give consideration to the enactment of legislation declaring all interstate gas pipe lines to be common carriers or public utilities subject to Federal control and regulation as to construction, operation, financing, and matters affecting the purchase, shipment, sale, and distribution of natural gas." (FTC Report No. 73-A, p. 75 in S. Doc. No. 92, 70th Cong., 1st Sess. (1928, printed in 1935))

Among other things, the report focused on various problems concerning the inter-relation of regulation and competition.

With respect to acquisitions by holding companies of interstate utilities, the report posed sharply the question of antitrust or regulation:

> "A grave question of future public policy is involved in deciding whether our experience of the two decades since the Clayton Act was passed, points in the direction of the amendments defeated in 1914 or of intrusting developments to some form of public regulation. In the latter event it is obvious that whatever regulation has existed up to the present has been futile to prevent the evils which our investigation has disclosed." (Id. at 54)

The FTC also said at the outset of its discussion of antitrust matters relating to holding companies, that it was

"vital to distinguish" between utility monopolies where an operating function was performed which "may be justified as sound public policy", from a "superimposed monopoly of ownership and control which of itself performs no operating function but is so powerful and far flung that it transcends the limits" of state and federal control and power. (Id. at 47).

The FTC believed it axiomatic that where utility regulation included rate regulation, competition must necessarily be abandoned:

> "The principle that a utility is entitled to a return on the fair value of its property or on the cost or actual investment has been corollary to the policy of abandoning competition as a method of regulation. Any social guarantee of a return on either basis would be obviously impractical if there were freedom among utilities to duplicate investment and service and to compete in rates as there is in private business. Here again, however, it is important to distinguish between the local monopoly of an operating company and the wide-spreading monopoly promoted by holding-company systems." (Id. at 49)

Soon after the submission of FTC Report No. 73-A, and as a result of the disclosure in that report and other disclosures, and the considerable deliberations of Congress in that and preceding years, Congress enacted the Public Utility Holding Company Act and the Federal Power Act.

(b) FTC Report 84-A

On December 31, 1935, the FTC submitted its final report, No. 84-A, in response to Senate Resolution 83 (S. Doc. No. 92, 70th Cong., 1st Sess. (1928, printed in 1936)). This report, over 600 pages in length, dealt "primarily with groups and companies of the natural gas and natural gas pipe line industry". (Id. at vii).

While our review of relevant materials in this report and in other legislative documents is primarily concerned with matters relating to competition in the natural gas in-

dustry, it will be seen that the question of the existence of and extent of competition is irrevocably tied with the consequences of many of the economic matters peculiar to the production, transmission and distribution of natural gas.

During this review it will be seen on many occasions that as to the public interest, Congress visualized regulatory control involving many of the very special problems peculiar to a natural gas company, which the Federal Power Commission in the El Paso-Pacific merger case actually resolved in a real and significant situation.

In various points throughout the report, the FTC described several of the characteristics of the business of gas pipeline transmission. It noted the existence of a dual situation: The heavy concentration of control by a few holding companies, mutual respect for the territories of each other and frequent collaboration by natural gas companies in the construction of long distance pipelines; and, in contrast, the existence of some competition between them. (Id. at 253-78).

Frequent allusion was made throughout the report to the large investments required to construct pipelines, the need to construct local distribution facilities and the need to acquire natural gas reserves to assure supply. (Id. at 55, 71, 112-13, 133).

The FTC also described the difficulty of independent entry into the pipeline business, as well as the consequent development of jointly owned pipelines and the resulting elimination of competition. (Id. at 133-34, 257). Another factor tending substantially to diminish competition among pipeline transmission companies was the existence of long term contracts to supply gas between the pipeline companies and their customers.[1] (Id. at 254).

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[1] Under regulation, this feature of the natural gas industry has necessarily been preserved, even to a greater extent than before. In order to achieve the maximum useful life of pipeline facilities, pipeline service through installed and certificated pipelines must continue indefinitely until such time as the Commission permits abandonment. Section 7(b) of the Natural Gas Act; see *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U. S. 137.

The FTC noted that the state "legislative trend appears to be to class all its [pipeline transmission] operations as a public utility subject to State regulation, except insofar as the interstate nature thereof may impose limitations upon the authority of States to regulate them. . . . Thus, the natural-gas industry presents the peculiar picture of being in part classed as a public utility, subject to varying degrees of regulation in different States, and in part classed as a nonutility not subject to any regulation". (Id. at 80-81).

The FTC also noted that with respect to pipeline companies:

> "In recent years the element of competition for . . . [pipeline] companies has been reduced somewhat in some States through the enactment of laws requiring natural-gas pipe-line companies to obtain certificates of convenience and necessity from a State public service commission before a pipe line can be built. In these States a public service commission may deny an applicant a certificate of convenience and necessity if in its judgment the construction of a new pipe line would result in economic waste or needless duplication, and in those instances where a certificate is denied on the ground that a given area is adequately served by existing facilities the company or companies established in that area are protected from competition." (Id. at 254)

"But", the FTC said, "in the main, the production and transmission of natural gas is still largely an unregulated enterprise." (Ibid at 254).

The FTC saw the growing existence of a "condition of unregulated private monopoly repugnant to American legal theory and enactments" due to the increasing concentration of control in the natural gas industry. (Id. at 85). It saw as the alternative to this condition:

> ". . . the extension of the field of public regulation [which would] . . . include the rate of exploitation

and production in relation to demand; field prices to be paid in relation to production costs; wholesale rates to be charged by transmission companies engaged in interstate as well as intrastate commerce, especially of gas sold to public-utility companies; public-utility distribution rates, and other factors necessary to safeguard alike the interests of landowners, producers, transmission and distribution interests, and wholesale and retail consumers of natural gas." (Ibid at 85)

The FTC believed that

> "Partial regulation of the field has already been sufficiently tried to indicate that to be effective regulation must be coincident in scope with the natural-gas industry." (Ibid at 85)

The FTC expressed considerable concern over the problem of conservation of natural gas and the relation of competition to conservation. It concluded that any effective conservation plan required public regulation in which the various factors bearing on private interests and the public interest were weighed impartially.

> "The economic necessity for conservation of natural gas lies in the importance of preventing excessive waste of this limited and exhaustible natural resource, the exploitation of which is subject to the effects of selfish and short-sighted operations. The interest of the public consists in conserving gas for those uses for which it is especially adapted, and in conserving the gas energy in the ground as a means of increasing oil production. Conservation as applied to natural gas, therefore, affects both the gas industry and the oil industry. The economic interests concerned are so numerous and so often in conflict that it is hopeless to expect the formulation or application of an effective plan for preventing waste by these interests unassisted by public authority.

> "... Practical operating conditions arising out of the occurrence of natural gas with oil, the necessity of producing the two together, and the desirability of conserving the energy of gas under pressure in the reservoir must be weighed against the cost of such conservation by returning gas to reservoir when it cannot be sold for industrial and public-utility purposes. . . . Then, too, there are the interstate and intrastate features of the business and the fact that part of the interests involved are subject to public-utility regulation, while other parts are conducted as unregulated competitive ventures. As a whole, the question of conservation and prevention of waste of natural gas, therefore, involves an extremely complicated and difficult situation, any satisfactory solution of which requires impartial weighing of private rights and equities and public interest." (Id. at 101-02)

At various points throughout its report, the FTC described the types of detrimental consequences which had flowed from unrestrained competition. The FTC recognized the need for methods of forestalling "unrestrained competitive contests" through public regulation.

> "... there is asserted to be danger of excessive competitive construction of gas pipe lines, tending unduly to enhance the cost, and consequently the price, of gas delivered to distant markets. Private interests have tried to establish and maintain claims to spheres of operation, or division of territory. But these efforts, which are claimed to be made in self-defense, are not based on any recognized legal right; indeed, they have been attacked as restraints of trade. Nor are they accomplished under any regulatory supervision to safeguard the public interest, nor the equitable consideration of new enterprises. The need for a surer means of forestalling unrestrained competitive contests, while preserving fair play, as long as some consuming markets remain to be served and new fields remain to be developed to their maximum capacity, appears to be still another cogent reason for regulatory measures." (Id. at 586)

Assuming regulation of transmission pipeline activities, the FTC believed that the "effect of joint ownership may be materially beneficial to the public generally" for several important reasons:

> "In a number of instances competition for markets has been avoided through the joint ownership and development of a natural-gas pipe-line system by several groups or companies, especially those owning oil- and gas-producing lands and leases. . . . Wherever these companies combined their gas reserves and under joint ownership constructed and operated a gas pipe-line system, competition between these companies for these markets was eliminated. Avoidance of competition is, of course, only one of several motives behind such combinations. In pooling their gas lands and leases the companies are assured of a greater source of supply to support a heavy investment in pipe lines, and by joint ownership only one line need be built to market their gas in a given area, and the cost of that line is distributed among several companies. Provided that the consuming public is adequately protected by a governmental regulatory body in such matters as rates and services, the effect of joint ownership may be materially beneficial to the public generally, in that the gas reserves available for certain markets may be increased, the wasteful duplication of investment in several competing lines may be avoided, and the possibility of making lower prices to the consumer is greatly increased. The realization of this possibility may depend largely on the existence of active control by the public authorities." Id. at 255)

In the concluding section of its report the FTC summarized as follows:

> "From among the many conditions affecting the industry, the following [sixteen] may be set out as some of the positive evils that have been found, the correction or prevention of which would, in many instances, require extension of regulatory authority over the natural-gas industry.

"(1) A great waste of natural gas in production.

"(2) Excessive cost of natural-gas production through extravagant competition in drilling wells.

"(3) Unregulated monopolistic control of certain natural-gas production areas.

"(4) Unregulated control of pipe-line transmission and of wholesale distribution.

* * * * *

"(6) Unregulated competition in building natural gas pipe lines to markets.

"(7) Costly struggles between rival natural-gas interests to conquer or defend territories of distribution." (Id. at 615)[1]

The FTC saw regulation "under noncompetitive . . . grants" for all three phases of the natural gas industry as the solution of the many problems in the natural gas industry which it had found as a result of its inquiry.

> "The three phases of the industry (i.e., (a) production, (b) transportation, and (c) distribution) present a combination of mining, transportation, and local public-utility problems. If in the public interest all three could be integrated into publicly controlled and regulated entities, with the essential set-ups, functions, and obligations of public utilities all the way from producer to consumer, under noncompetitive, but properly regulated, grants made upon a showing of public convenience and necessity their regulation would be much simplified." (Id. at 601-02)

The FTC made seven formal recommendations to Congress. The third recommendation was that interstate gas pipeline companies should be regulated, including regulation of intercorporate relations of companies owning or controlling gas pipelines. The FTC said:

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[1] (8)-(16) Omitted because relating to matters other than competition, such as conservation, corporate manipulation, etc. (Id. at 615-16).

> "A Federal regulatory law should be enacted applicable to interstate natural gas pipe lines which transport gas for ultimate sale to and use by the public, regulating contracts for purchase of gas to be transported interstate, or regulating rates for carriage or city gate rates at the end of such transportation, or all of these. Security issues, accounts, beginning and abandonment of operations, and intercorporate relations of companies owning or controlling gas-pipe lines should also be regulated." (Id. at 616-17)

We do not seek here to demonstrate that particular provisions of the Natural Gas Act mean precisely what the FTC visualized as public regulation of the natural gas industry. But we have shown the framework of economic philosophy which pervaded the thinking of the FTC when, on the last day of 1935, its report was submitted to Congress, and when Congress took up the task of considering and thereafter enacting Federal regulation of the interstate natural gas industry.

The showing we make here is not for the purpose of attempting to prove that competition has no place in the natural gas industry under the Natural Gas Act. Nor need we prove that there is no possible application of any or all of the antitrust statutes to natural gas companies in appropriate circumstances.

We do seek to demonstrate that the regulation and control of the existence and extent of competition have been entrusted by Congress into the hands of the Commission; and that, in a situation such as the one presented in this case, Commission regulation under the Natural Gas Act is primary, and enforcement of Section 7 of the Clayton Act is at best supplementary or secondary; and that, therefore, petitioner's contention that the Commission should have deferred its proceeding until completion of the antitrust case has no basis in legislative Congressional purpose or in the statutes enacted by Congress.

2. *Congressional Hearings were conducted during the period from 1935 to 1938. In 1938, Congress enacted the Natural Gas Act.*

The earliest proposal to regulate the interstate natural gas industry was contained in H. R. 5423, 74th Cong., 1st Sess. (1935). This bill contained three titles, the first two of which ultimately became the Public Utility Holding Company Act and the Federal Power Act, respectively.

During the 1935 hearings, it was recommended that Congress await the FTC's final report in the natural gas industry. The committee followed this recommendation and did not report out Title III, which related to regulation of the interstate natural gas industry. Title III of the 1935 bill had been, according to its draftsman, a hastily drawn addition to the bill, and was largely a repetition of Title II with "natural gas" substituted for "electric energy".

(a) The 1936 Hearings

In 1936, another and different bill was introduced relating to regulation of the natural gas industry. (H.R. 11662, 74th Cong., 2d Sess. (1936).) During the hearings held before a House Subcommittee, the FTC General Solicitor who had been in charge of the overall investigation of holding companies and electric and gas utilities stated the firm belief that competition had no place in the business of local gas distribution or among pipelines:

> ". . . once they have been established in a territory, there is a monopoly in that area, and that should be so. We do not want two gas concerns serving a community, any more than we would be willing to go back to the days when they had two telephone systems and we had to pay two telephone rates. There would be nothing desirable about that. But that does not obviate the fact or the need for regulation within that area.
>
> • • • • •

> "Pipelines do not have common termini. That was a question I am glad you raised, because there was a question asked yesterday that seemed to indicate that there could be competition between these pipelines if they are once established, a good deal like it is with railroads. Of course, that is impossible. They do not run to the same points. They go out from the field in different directions, and no other pipeline comes into that particular territory. Each line, once established, has a monopoly on the territory, and the company that is there first has that territory." (Hearings, House Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 11662, 74th Cong., 2d Sess. (1936), pp. 53, 69.)

Further, he analyzed Section 1(b) of the proposed bill as limited to

> ". . . only those interstate activities which involve natural gas intended for ultimate distribution to the public, as that phase of its activities places the natural-gas company in the status of a public utility, enjoying a monopolistic position subject to regulation in the public interest." (Id. at 17)

No hearings on the 1936 bill were held in the Senate and, no action was taken before the close of the 74th Congress.

(b) The 1937 and 1938 Hearings, Reports and Floor Debate

In 1937, Congressman Lea, Chairman of the House Committee on Interstate and Foreign Commerce, sponsored H. R. 4008 (75th Cong., 1st Sess.) which, with certain changes, was to become the Natural Gas Act.[1]

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[1] The Natural Gas Act of 1938 was also known as the "Wheeler-Lea Natural Gas Act" (88 Cong. Rec. 827 (1942)). See also p. 211, infra, where a portion of Senator Wheeler's statements on the floor of the Senate are quoted.

In contrast to the earlier bills which made no similar provision, Section 7(c) of H. R. 4008 made it unlawful for any natural gas company to

> "undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural gas company, or acquire or operate any such facilities or extensions thereof . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities. . . ." (H.R. 4008, 75th Cong., 1st Sess., §7(c) (1937))

The proposed Section 7(c) did not require a company already serving a market to secure a certificate to enlarge or extend its facilities to meet increased market demands.

There was vigorous protest to the proposed Section 7(c), which, however, Congress thereafter enacted. The protests came from several quarters including state regulatory commissions, local distributing companies and municipalities. It was argued that this provision would restrain independent pipelines from seeking to come into a territory already being served and that it would encourage the established pipeline company to attack any independent project during the regulatory delay in securing a certificate of public convenience and necessity. In this latter regard, Mr. Scheer, representing the Cities Alliance, an association of municipalities, asserted that the established company would

> ". . . attack the independent project by undermining his financing, by monopolizing available gas reserves, and by secretly alienating his potential or contracted customers. The fact that such activities might be in violation of the Federal antitrust laws would not, in our opinion, restrain the established pipe-line concern from this type of so-called self-

defense against 'raiding'." Hearings before House Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess. (1935) at 35.

A representative of the Illinois Commerce Commission, which did not favor Section 7(c), made this statement:

> "The Lea Bill [H.R. 4008] is predicated upon the philosophy that the public interest can best be served by a regulated monopoly, as far as the relationships between public utilities and the public is concerned. There is sometimes some question in my mind as to whether some competition is not necessary to supplement regulation." (Id. at 44)

During the testimony of Mr. Scheer of the Cities Alliance, Congressman Halleck indicated his belief that companies placed under rate and other types of regulation were entitled to some restraint of competition:

> "Mr. Halleck. Is it not true that, generally speaking, the practical justification for governmental regulation of utilities follows from the fact that it is claimed certain privileges, what may be termed a governmental monopoly through franchise by the Government is conferred, the acceptance of which in turn subjects them to a measure of governmental control and regulation, particularly as respecting rates?
>
> "Mr. Scheer. That is true.
>
> "Mr. Halleck. These companies, if they are to be controlled as contemplated in this character of legislation, should they not have some assurance that they will not be crucified by some of the practices to which you have referred?" (Id. at 69)

Congressman Pettengill advanced the same ideas during this hearing:

> ". . . but my question was that if the Federal Government assumed to impose a burden, by controlling the source of supply and the price charged for it

then the question arises whether or not the Federal Government should then give the benefit of some degree of protection against further competition." (Id. at 77)

Chairman Lea, who assumed responsibility for the bill (Id. at 81) summed up his ideas relating to regulation, competition and the effect of the proposed Section 7(c), with these highly significant observations:

"I think anyone looking over the history of regulation in recent years could not help but reach the conclusion that the decided weight of opinion is, for modern regulation, in favor of a certificate of convenience and necessity. The only justification for regulating these utilities is that they do have what is in effect, a monopoly. In the absence of that monopoly it might be better to have no regulation so we could depend upon competition taking care of the needs of the consumer.

"Now, you come here and you say we want regulation. We want a commission to depend upon, to give us reasonable rates, to fix maximum and minimum rates, but we are not satisfied with that. We want to play with loaded dice. We want regulatory control of the utility, but unrestrained competition for the consumers. If we can get an advantage through the lack of regulatory control over new competition coming into the field, we want that advantage.

"We must eventually reach a conclusion one way or another, whether we trust the Commission. If we can trust the Commission, with the important duty of fixing our rates, why can we not trust them with the question of two lines or one? Is it necessary to add the power of unrestrained competition in order to give us just rates when that is the object of setting up a commission?

* * * *

"The question is whether you are going to have one or two. The power is given to the Commission to decide, under the circumstances, whether it will

permit another company to go in there and compete or take over a certain territory instead of the old company.

* * * *

"And the Commission must make that decision from the standpoint of public convenience and necessity.

"If such competition is in their judgment justified, there is nothing in this bill which would preclude the communities from having it. If you want to enter into some competition that is unwarranted, then this bill would stand in the way of it, because we assume that the Commission would not give that authority.

"If you have legitimate regulation, in the end your community will get better and cheaper rates than it will with too much competition.

"The gas industry is in a separate position from other utilities. There is greater reason for this provision in the case of gas than electricity. Electricity is produced by permanently renewable sources of supply. Gas fields are limited, and it is only a matter of years when all are going to be exhausted. Communities are going to build up relying on gas and then have a hard time adjusting themselves to conditions to come. The investment of gas companies is more hazardous than that of other public utilities.

"If there is any justification for a certificate of convenience and necessity, in my judgment, it is in the gas field." (Id. at 82-83)

Mr. Scheer sought to answer these views, and asserted again that it was undesirable to require a certificate of public convenience and necessity because of its restraining effects upon competition.

Chairman Lea, in turn, responded:

"You have regulation established by law. The companies are regulated presumably in the interest of the public. That is what regulation is — monopoly controlled in the public interest." (Id. at 83)

After the close of the hearings, the House Committee on Interstate and Foreign Commerce issued its report and stated that the proposed bill "confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce. . . ." (H. Rep. No. 709, 75th Cong., 1st Sess. (1937) at p. 1.) The comprehensive regulatory power entrusted to the Commission under the bill was described as follows:

> "The Bill provides for regulation of the exportation and importation of natural gas and authorizes the Commission to ascertain the cost of property used in rendering service; to direct extension or improvement of transportation facilities, and require the interconnection of facilities; to regulate the abandonment of service; to prescribe a uniform system of accounts; to determine proper depreciation rates; to fix rates and charges for natural gas sold for resale for ultimate public consumption; to investigate compacts between the States; to compile information relative to the effect and operation of any compacts between the States; and to make investigations and report to Congress respecting the natural gas industry. . . ." (Id. at 6)

The report also described the proposed Section 7(c) as similar to provisions in the Interstate Commerce Act, the Communications Act of 1934, and the Motor Carriers Act of 1935, requiring certificates of public convenience and necessity for extensions of service. (Id. at 6).

The Senate Report on the bill merely repeated the language of the House Report. (S. Rep. No. 1162, 75th Cong., 1st. Sess. (1937)).

Much of the floor debate in the House during the first session of 1937 was concerned with the relationship of regulation and competition, and the powers entrusted to the Commission relating to competition:

> "Mr. Beverly M. Vincent. In reference to the statement made just now [by Chairman Lea], if

a company wants to go into another territory, it must get permission from the Federal Power Commission?

"Mr. Lea. To go into an already occupied territory.

"Mr. Beverly M. Vincent. That eliminates competition, does it not?

"Mr. Lea. There is no prior competition there. Before you can have competition in the same territory a permit must be secured from the Power Commission; but there is no general certificate of convenience and necessity required in order for a company to expand.

"Mr. Beverly M. Vincent. Will not the effect of this bill be to limit the competition in any field, or in any State?

"Mr. Lea. It will be left to the Federal Power Commission.

• • • • •

"Mr. Hook. Will this in any way limit competition as between gas companies?

"Mr. Lea. It will be subject to regulation by the Power Commission in every instance; whether or not one company may enter the territory of another, in a community already occupied, will be up to the Power Commission. But there is no exclusion of any company by law.

• • • • •

"Mr. Phillips. The Gentleman stated a few minutes ago that no natural-gas company could come into a field already occupied by a company without a hearing by the Commission. Do I correctly understand that is the effect of this bill?

"Mr. Lea. Yes.

"Mr. Phillips. How would that serve to keep down charges to the ultimate consumer? I should think it might keep charges up, due to the fact the monopoly was preserved.

"Mr. Lea. Ordinarily the community wants the services performed by one company; because, in such a case, the people can have better service than

they can have with the facilities of two companies going through the streets of the same community.

"Mr. Phillips. Suppose the company which wanted to come in would offer a cheaper rate?

"Mr. Lea. The Commission has power to let them come in.

• • • • •

"Mr. Lea. Duplication means inferior service or, in the end, higher prices.

"This act proposes Federal regulation of the transportation of natural gas in interstate commerce, which, in the final analysis, contemplates Federal regulation of indiscriminate interstate duplication of service, interstate service of inferior character, and fair and reasonable interstate rates.

• • • • •

"Mr. Halleck. ...

"Now, some question has been raised here about the possibility of setting up a monopoly under the provisions of this bill and that effects on price to the consumer arising out of competition might be destroyed. May I point out in this connection that the reason for this bill, the reason the cities and the consumers' representatives asked for this bill is that they say that competition has heretofore failed to bring the wholesale price down. In other words, competition has not operated to keep the price down and as a result they say to Congress, 'This gap that has existed must be filled by the intervention of the Federal Government.'

• • • • •

"Competition in this regard has been ineffective, and as a result, even though the prices of the distributing company to the consumers have been kept within reasonable limits, insofar as the activities of the distributing company are concerned, real protection has not been available to the ultimate consumer, because in many instances the transportation company, transporting in interstate commerce, has charged a rate which is higher than is deemed fair and reasonable.

"So it occurs to me this is an entirely proper field for governmental intervention.

• • • • •

"My opinion is that the operations of the Federal Power Commission in applying this act will be in the regulation of rates downward, not in the regulation of rates upward, and I am inclined to believe that if this regulation is to be applied that the public interest will be served by putting into effect the certificates of convenience for which this bill provides, to the end that the companies coming under this bill, and to be regulated by it, may know that they may extend their facilities under the protection of this bill. In the long run such a provision will promote the public interest.

• • • • •

"Mr. Cole of Maryland. ...

"Briefly I want to reply to the question, if I may supplement what the distinguished chairman of our committee said, of the gentleman from Kentucky as to what effect this bill will have in requiring certificates of necessity for an area already served. This bill means the same as in railroad regulation, that it is foolish to permit another railroad to come into an area already adequately served, charging rates under the regulation of a commission, such as the Federal Power Commission, unless justification therefor can be shown. . . . Under the passage of this bill a company enjoying, you might say, a monopoly in the city of Chicago, if but one line serves that city, would be forced to charge a fair and reasonable rate, and our Commission, if we have confidence in them, as we do, would see to that, and of course the public could not obtain any benefit by competition coming in, because that competition would be likewise regulated." (81 Cong. Rec. 6721-24 (1937))

The 1937 House Bill was passed over several times in the Senate (81 Cong. Rec. 8918-19, 9312-17 (1937); as was

the same proposed Act contained in the 1938 House bill, H. R. 6586 (83 Cong. Rec. 6986, 8285 (1938)).

During the course of the relatively brief discussion on the Senate floor, Senator Wheeler, sponsor of the bill, stressed the legislative purpose to produce comprehensive and pervasive control of the entire natural gas industry, divided only as between federal and state regulatory authorities:[1]

> "Federal jurisdiction plus the jurisdiction of the several States should be so utilized and coordinated as to produce effective regulation and the termination of existing abuses to the end that there should be no unregulated twilight zone. Otherwise our system fails in a very crucial situation." (83 Cong., Rec., Appendix 2424 (1938))

At the final Senate reading of the bill, an amendment to Section 7(c) was proposed and adopted which provided that with respect to an application for a certificate by a company proposing new service to an area in which service was already being provided, "primary consideration" was to be given to the applicant's "ability to render services at rates lower than those prevailing in the territory to be served." (83 Cong. Rec. 8347 (1938).) The bill, H. R. 6586, as amended, was then passed by the Senate and returned to the House for its consideration of the Senate amendment.

In the place of the Senate amendment, Congressman Lea offered a substitute which the House adopted and which thereafter the Senate adopted. This substitute amendment provided, in part, that "the Commission shall give *due* consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served. . . ." Congressman Lea stated that the advantage of this provision as compared with the Senate amendment was that it would require "a new company to show it is capable of *main-*

[1] See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 19-22.

taining its rates as well as providing them immediately", and that it would "prevent a lot of cutthroat competition among the various companies". (emphasis supplied) (83 Cong. Rec. 9101 (1938)).

Thus, in 1938, the Natural Gas Act was passed by Congress, signed by the President and became law.

3. *Section 20(a) of the Natural Gas Act provides no support for petitioner's contentions.*

Petitioner contends that its theory of "primary antitrust jurisdiction" is supported by Section 20(a) of the Natural Gas Act. Section 20(a) allegedly "compels the conclusion that Congress fully intended that the corporations subject to the jurisdiction of the Power Commission should continue to be required to measure up to the standards of conduct imposed by the antitrust statutes." (Pet. 35).

Section 20(a) empowers the Commission to institute actions in the federal courts to enjoin violations and to enforce compliance with the Natural Gas Act and Commission rules, regulations and orders thereunder. It then provides:

> "The Commission may transmit such evidence as may be available concerning such acts or practices *or concerning apparent violations of the Federal antitrust laws* to the Attorney General, who, in his discretion, may institute the necessary *criminal* proceedings." (Emphasis supplied.)

There are no other provisions in the Act to indicate what, if any, practices within or affecting the jurisdiction of the Commission under the Act could constitute a violation of the antitrust laws for which a criminal proceeding could be instituted. Nor does the legislative history provide any indication that matters within or affecting the jurisdiction of the Commission might possibly be subject to attack under the antitrust laws or, in particular, under Section 7 of the Clayton Act.

Indeed, the legislative deliberations indicate quite clearly that control and regulation of the existence and extent of competition, insofar as it relates to matters within or affecting the jurisdiction of the Commission, were entrusted to the Commission.

In all of the bills considered by Congress in 1935, 1936 and 1937, it was provided that "the Commission may transmit such evidence as may be available concerning such acts or practices [in violation of the Act or Commission rules, regulations or orders] to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under the Act" (H. R. 5423, 74th Cong., 1st Sess., § 329(a); H. R. 11662, 74th Cong., 2d Sess., § 19(a); H. R. 4008, 75th Cong., 1st Sess., § 19(a).)

The phrase "or concerning apparent violations of the Federal antitrust laws" was included for the first time in the 1938 Bill, H. R. 6586.

This phrase had been suggested during the 1937 House hearings by the Cities Alliance, which it will be recalled, had opposed the proposed Section 7(c) because of its restraining effect on competition. As Mr. Scheer pointed out, the Cities Alliance was a group which had centered its efforts upon a more effective enforcement of the antitrust laws. (Hearings before House Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. (1937) at 59-60).

There is no discussion of the intended meaning of this phrase in any of the hearings, debates or reports of Congress.

For purposes of evaluating petitioner's contention that Section 20(a) supports its argument of the "primary antitrust jurisdiction" of Section 7 of the Clayton Act, the Court need not determine the meaning of the provision in Section 20(a) which we are discussing. The Court need only decide that it does not have the meaning and does not reflect the congressional intention attributed to it by petitioner.

Certainly the entire legislative history of the Act, including the particular history of Section 20(a), and the very terms of the Act (including the provisions of Sections 7(c) and (e) which set forth the standard of public convenience and necessity), show that the Commission was entrusted with the duty to control the existence of and extent of competition; and that, at least to a great measure, the concepts of the antitrust laws were abandoned or "leavened" as means for producing the results which Congress intended for the natural gas industry and consumers of natural gas.

Indeed, the conclusion that Congressional intention included the notion that the Federal Power Commission was to consider competition as only one of several factors is supported further by the Federal Trade Commission's statement in one of its TNEC Monographs, published in 1940:

> ". . . [Under the Natural Gas Act] the Federal Power Commission has already begun to function as a regulatory agency particularly in the matter of the establishment of possibly competing natural gas pipe lines. . . . The Federal Power Commission appears to have taken the position in one of the cases referred to that *competition by a proposed new pipe line* for the business of an area which can be adequately supplied by an existing pipe line and which entire business the existing pipe line may require in order to give through ample loading of its system the lowest cost service to the public *may not be in the public interest.*
>
> "Such an attitude of the Power Commission removes from the pipe line ownership the necessity of protecting itself by whatever means are at hand against alleged destructive competition *through the transfer of such protective functions to a public body weighing all the interests involved.*" (Emphasis supplied) (TNEC Monograph No. 36, 76th Cong., 3d Sess. (1940). at 10)

It may be, though the question is not here, that as in the *Abilene* case,[1] any reading of Section 20(a) which sanctioned a successful antitrust action concerning transactions or activities within or affecting the Commission's jurisdiction or which might interfere with the Commission's effective exercise of its statutory powers "would be absolutely inconsistent with the [other] provisions of the [Natural Gas] act" (204 U. S. 426, 446), because the Court decision would create new conditions (generated by the antitrust concepts of stimulating competition and preventing monopoly) which the Commission would be powerless to prevent even if detrimental to the public interest. And, the Commission's continuing ability to effectuate fully its regulatory purpose would have been interfered with, to the extent that operating and other conditions had been altered for the purpose of stimulating competition or preventing monopoly, without regard for the many other special public interest factors peculiar to the natural gas industry.

It seems clear that Congress at most could only have intended that the criminal antitrust laws be applicable to activities of regulated natural gas companies to the extent that the subject matter of such antitrust actions were not within or would not affect the jurisdiction of the Commission or would not affect the Commission's proper exercise of its statutory powers.

Petitioner's contentions are misplaced further. Section 7 of the Clayton Act provides only for civil proceedings and therefore "we are not here concerned" with the question of "criminal prosecutions", the only type of antitrust matter referred to in Section 20(a). *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U. S. 173, 192.

It is certain that Section 20(a) does not reflect any Congressional intention to confer primary antitrust jurisdiction of the type which petitioner here urges.

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[1] *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426.

4. *The 1942 Amendment of Section 7 of the Natural Gas Act substantially strengthened the Commission's certificate power and its power to control and regulate competition.*

In 1941, Congressman Lea introduced a bill to amend Section 7 of the Natural Gas Act, H.R. 5249, 77th Cong. 1st Sess. The principal change proposed was to make it unlawful for any natural gas company or person to undertake *any* operation, construction, extension or acquisition of natural gas facilities without a certificate of public convenience and necessity issued by the Commission.

The Report of the Committee on Interstate and Foreign Commerce submitted by its Chairman, Congressman Lea, described three principal reasons for this proposed change. (H.R. Rep. No. 1290, 77th Cong., 1st Sess., (1941) at 1, 2-3).

First, under the existing Section 7(c) a certificate was required only in such cases where the market proposed to be served was within the "market [area] in which natural gas is already being served by another natural-gas company . . .". As a result, there had been considerable difficulty and tremendous time-consuming preliminary investigations and hearings to determine the meaning of the word "market" and whether the Commission had "jurisdiction to consider, on the merits, the granting or denying of the certificate". (Id. at 1-2).

Second, the limitations on Commission consideration of proposed construction and extension had been construed by the Commission "to have the effect of excluding from consideration the interests of producers of competing fuels and competitive methods of transportation". (Id. at 2).

Third, and finally:

> "Section 7(c), as at present in force, regulates competition in the public interest by preventing uneconomic extensions and allowing those extensions which are in the public interest and in accord with

the policy of the statute; but it so regulates only in case of extensions to 'a market in which natural gas is already being served by another natural-gas company'. The present section consequently allows unregulated competition in extensions and even economic waste in the construction of new interstate natural gas pipe lines, by natural-gas companies subject to the Natural Gas Act in all other cases. Such a natural gas pipe line, as soon as it is constructed, it should be noted, comes within the Commission's jurisdiction and is subject to regulation as a facility used for the transportation of natural gas in interstate commerce. Obviously adequate regulation of such pipe lines when constructed requires that the Commission also have jurisdiction to regulate construction and initial financing. By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise." (Id. at 2-3)

We interrupt for a moment to point out the particular pertinency here of the observation in this House Report of the Committee on Interstate and Foreign Commerce that if the Commission is not entrusted with full authority to consider all proposed constructions, extensions and acquisi-

tions of natural gas facilities, "the Commission may find itself confronted with a situation where it must . . . accept conditions which appear undesirable in the public interest . . .". (Id. at 3).

If the District Court in the Clayton Act case were permitted to require separation and independent operation of El Paso and Pacific, sanction would be given to the creation of conditions which are "undesirable in the public interest" because the Commission has here found that the unification and integration of El Paso and Pacific, and not their separate and independent operation, is required by the public convenience and necessity.

The Senate Committee in its report also emphasized the need to regulate all new proposed natural gas service, by taking into account all factors bearing on the public interest:

> "Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to 'a market in which natural gas is already being served by another natural-gas company'. Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied. Obviously these are powers that Federal Power Commission should have and should exercise in the public interest." (S. Rep. No. 948, 77th Cong., 2d Sess., (1942) at 1-2)

Commissioner Basil Manly had been the first witness at the House Committee hearings held in 1941 on the proposed amendment to Section 7 of the Natural Gas Act, which was supported by the Commission.

Among other things, he described the inability of the Commission and state regulatory agencies to deal with a

situation which had developed where three pipelines were competing to provide natural gas service to Milwaukee. He said:

> "It was the expressed intention of Congress in enacting the existing certification section of the Natural Gas Act to prevent wasteful competition of natural-gas companies, but, as is so clearly illustrated in the Milwaukee cases, the existing section has left the Federal Government powerless to deal with an aggravated case of potential competition on the part of three natural-gas companies." (Hearings Before the House Committee on Interstate and Foreign Commerce, H. R. 5249, 77th Cong., 1st Sess., (1941) at 4).

Commissioner Manly was asked whether the proposed Section 7(c) would have the effect of putting the "freeze [on] the present existing service to such an extent that no competition would be possible . . . unless your commission thought it advisable to grant such a certificate of convenience and necessity". He also was asked whether the effect of the proposed amendment to Section 7 would be a "stifling of competition". (Id. at 11). He answered:

> "My views on that are that that power exists under the existing statute; the precise power exists under the existing statute, and so far as the proposed amendment is concerned. I will ask you to look at subsection (g)." (Id. at 11)

The proposed amendment to Section 7 of the Natural Gas Act included a subsection (g), which was thereafter enacted:

> "(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."

Thus, Congress made it clear that the Commission had the power to prevent an absolute monopoly in a particular area where the public convenience and necessity required the construction of a second pipe line in an area already served. Commissioner Manly's testimony makes clear that the various factors relating to the public convenience and necessity would have to be considered by the Commission:

> "Mr. Boren. I want to ask if this amendment, in your judgment, in anywise changes section (c) of the original act in which, at least, it is my opinion, that the committee had the definite intention of making it a mandate to the Commission to issue a certificate where a company could definitely show that it could provide the services of natural gas at a cheaper cost to the ultimate consumer.
>
> "Commissioner Manly. I do not think so, sir. I think that is specifically reserved in paragraph (g); but it [cheaper cost as the criterion] is not made mandatory, not spelled out, for the reason that it is not the only criterion that can be set up." (Id. at 18-19)

Another relevant subsection is § 7(f), which was enacted in 1942, and which provides:

> "(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization."

Commissioner Manly described the reason for the proposed subsection (f) as follows:

> "Mr. Pearson. Is there any particular reason why existing companies now serving communities should have the protection which your first subsection gives them in this act?

"Commissioner Manly. I think so, sir. I think an existing company is entitled to have a territory defined within which, or an area defined, rather, within which it may render service without coming in and getting the approval of an extension every time it wants to run a line over to a new community within its service area.

"Mr. Pearson. That would practically eliminate the granting of any further certificates of convenience and necessity in the areas in which these existing companies now operate, would it not?

"Commissioner Manly. No, sir; it does not [because of subsection (g), which he then quoted]." (Id. at 15)

Following the close of House hearings, the Chairman of the Committee, Congressman Lea, wrote to the Commission requesting a report on H.R. 5249, the proposed amendment to Section 7 of the Natural Gas Act. (Id. at 81).

The Chairman of the Commission, Leland Olds, responded on August 2, 1941 and, reported that the Commission was in favor of and urged the enactment of H.R. 5249 with certain amendments suggested at the hearings on the bill. He first pointed out various problems which the Commission had faced in applying Section 7(c) as then in force, including the problems involved in the *Milwaukee* case. He then made these significant observations:

"The purpose of section 7(c), as at present in force, is obviously to regulate competition in the public interest by preventing uneconomic extensions, but allowing those extensions that are in the public interest and in accord with the policy of the statute. The result in cases like the Wisconsin case just referred to, because of the existing restrictions on the Commission's jurisdiction, is to allow unregulated competition and even economic waste in the construction of interstate natural gas pipe lines by companies which are natural-gas companies subject to the jurisdiction of the Commission under the Natural Gas Act. It is to be noted that the pipe line, as soon

as it is constructed, comes within the Commission's jurisdiction and is subject to regulation as a facility used for the transportation of natural gas in interstate commerce. Adequate regulation is obviously not provided unless the Commission has jurisdiction to regulate the construction of the pipe line and control its initial financing as well as to regulate its operation after construction. By the unregulated construction of the pipe line, the public interest may be so disregarded that the proper regulation of operation thereafter may prove a difficult matter or may be practically impossible because the construction of the line is uneconomic or costs are inflated. Regulation should begin with construction of the line, not with operation after construction.

"The best solution, in the opinion of the Commission, is that proposed by H. R. 5249, which requires certificates of public convenience and necessity for all transportation or sale of natural gas as well as for all extensions and new construction of facilities regardless of whether such operation, extension, or new construction is of facilities to a market in which natural gas is already being served by a natural-gas company or not." (Id. at 81-82)

Commissioner Olds then noted, as did Commissioner Manly in his testimony (Id. at 5) that:

"The proposed amendment to section 7 follows, in general, the legislative scheme of the sections of the Motor Carrier Act of 1935 governing certificates of public convenience and necessity." (Id. at 82)[1]

This observation provides additional pertinency to this Court's decision in the *McLean* and *Minneapolis* cases, which involved a consolidation of motor carriers and a railroad acquisition respectively, both of which were unsuccessfully attacked on antitrust grounds.

[1] "[Commissioner Manly.] The present amendment has been drafted . . . after conferences with Chairman Lea, of the House Committee on Interstate and Foreign Commerce; with representatives of the National Association of Railroad and Utilities Commissioners; representatives of the coal, labor, and railroad interests; representatives of a number of the natural-gas companies; and representatives of the Reserve Gas Pipe Line Co." (Id. at 5)

H.R. 5249 was passed by the House (87 Cong. Rec. 9623 (1941)).

After the Senate Committee on Interstate and Foreign Commerce had issued its report (S. Rep. No. 948, 77th Cong., 2d Sess. (1942)), the bill reached the Senate floor. Senator Wheeler, Chairman of that Committee and a sponsor of the Bill made it clear that the purpose of the amendment of Section 7(c) was to give the Commission further power to inhibit competition:

> "Mr. White. Am I correct in my understanding that, under the present law, a certificate of convenience and necessity is required only when the applicant seeks to invade a field already occupied and being served?
>
> "Mr. Wheeler. The Senator's statement is correct.
>
> "Mr. White. And that this proposed legislation would extend the requirement for a certificate for the purpose of preventing wasteful and uneconomic competition?
>
> "Mr. Wheeler. The Senator is entirely correct." (88 Cong. Rec. 827 (1942)).

Thereafter, the Senate passed the Bill, and the President signed it.

5. *Congress could not have intended Section 7 of the Clayton Act to have the alleged primacy over Section 7 of the Natural Gas Act which petitioner urges.*

We have now closed the cover on the pertinent legislative history of the Natural Gas Act.

Nowhere in that legislative history is there mention of any intention to grant to the Attorney General the power to prosecute under the antitrust laws, and in particular the then Section 7 of the Clayton Act, with respect to any matters within or affecting the present or prospective jurisdiction of the Commission. Nowhere in that legislative history is there any reference or mention that Congress had

any intention to provide a stimulus to competition in the natural gas industry by means of the judicial enforcement of the antitrust laws, and in particular the then Section 7 of the Clayton Act, or otherwise.

The reason there was no discussion of these points is apparent.

Congress intended to entrust to the Commission, and not to the Attorney General or the courts, the power to control and regulate the existence and extent of competition in the interstate natural gas industry. The existence and extent of competition were to be left to the pragmatic and expert judgment of the Commission.

This is particularly true since Congress found so many instances where competition in the natural gas industry was detrimental and not beneficial to the public interest. Thus Congress, which empowered the Commission to prevent "wasteful competition" could not have intended the District Courts to effectuate the antitrust laws so as to implement competition or independent pipeline operations where the Commission might find, as in this case, that such competition or independent operation would be wasteful and uneconomic as compared to unification and integration.

Petitioner states that the underlying policy "of both the Clayton Act and the Natural Gas Act [is] to protect the consumer from exploitation at the hands of corporations or individuals who have amassed great concentrations of economic power". Petitioner then leaps to the conclusion that since the purposes are the same, consumers must be protected in the same way. (Pet. 29-30).

On petitioner's reasoning, the failure of Congress to confer upon the Commission the power to determine whether or not the antitrust laws have been violated, shows Congressional intendment that not only shall the antitrust laws apply, but they shall be given primary application. Reduced to this case, petitioner's argument is that the suit under Section 7 of the Clayton Act has alleged

primacy over the proceedings under Section 7 of the Natural Gas Act and this conclusion allegedly fulfills alleged Congressional intendment.

This reasoning at its outset confuses purpose and method. The legislative idea underlying the antitrust laws is that the operation of competition, except where otherwise legislatively restrained, produces the highest public good. Therefore, in order to effectuate this legislative intent of public interest, Congress has directed that the courts, upon application by the Attorney General, the Federal Trade Commission, or other parties, shall determine whether particular transactions or acts have an adverse impact on competition of a kind which Congress has forbidden. The antitrust laws provide a method of achieving a result which Congress intends, and, does not entrust to the courts the power to determine whether even though particular transactions or acts have the proscribed results, they may nonetheless be "in the public interest" or be required by "the public convenience and necessity".

In the Natural Gas Act, Congress adopted a different approach. Congress did not simply prescribe a method and reserve to itself the sole legislative power to determine what is and what is not in the public interest. It delegated to the Commission the power and the duty to decide in each particular situation what may best serve the public. In making this delegation, Congress has imposed various standards to guide Commission action. Rates must be "just and reasonable"; construction of new natural gas facilities, extension of existing facilities, operation of natural gas facilities and acquisition of natural gas facilities must be required by "the public convenience and necessity."

Whether a particular rate is "just and reasonable" is left to the Commission to decide on the facts in each case. What new construction, extension, operation or acquisition is required by the public convenience and necessity is left for the Commission to decide on the facts in each case.

No better example of fulfillment of Congressional intendment, as expressed in the Natural Gas Act, is provided than in the Commission's decision in this case, where, as a part of the Commission's continuing regulation of these two companies, it found, on the particular facts, that their proposed unification and integration was required by the public convenience and necessity.

Certainly, Congressional intention, as expressed in the Natural Gas Act, that the Commission bring to the proceedings before it its "familiarity with industry conditions"[1] and specifically in this case its familiarity and understanding of El Paso's and Pacific's problems, was fulfilled. Certainly, too, the district courts do not possess the Commission's familiarity with industry conditions, its familiarity with the long history of the companies involved, its familiarity with their continuing problems, or a continuing responsibility and *duty* in the future to so regulate the companies that their present and future operations best serve the public interest.

So it is true that, assuming the Commission had no power to determine under the Natural Gas Act the lawfulness of El Paso's acquisition of Pacific's stock, the District Court could not, if Congressional intention were to be fulfilled, take action which would interfere with matters within or affecting the present or prospective jurisdiction of the Commission.

If the Commission had awaited "final determination" of the antitrust case, as petitioner urges was its duty and the District Court had decreed the separation of El Paso and Pacific into two separate and independent companies, the prospective jurisdiction of the Commission over rates and services of these two natural gas companies subject to the jurisdiction of the Commission under the Natural

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[1] *American Trucking Associations, Inc.* v. *United States*, 344 U. S. 298, 309–310; see also *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U. S. 90, 105.

Gas Act would have been materially affected and interfered with.

The Commission would have been faced with the task of determining under Section 4 of the Natural Gas Act what rates were "just and reasonable" for Pacific upon a complex of facts which, as the Presiding Examiner and Commission found, would have required substantially higher rates to consumers in the Pacific Northwest area if Pacific were to achieve a financial condition which would have permitted it to continue to operate and attempt to discharge its public service functions; but which would have had a depressant effect on expansion of natural gas service when rates were increased.

Likewise, the Commission would have been frustrated in effectuating improved natural gas service to the Pacific Northwest area because of Pacific's inability to propose to the Commission under Section 7(c) of the Act new extensions to communities not being served by natural gas.

Likewise, in the light of El Paso's need for new and large quantities of additional gas supply and its need for large new reserves of dry gas, the Commission would also have been frustrated in effectuating the goal of improved and expanded natural gas service to the market areas served by El Paso.

In short, the Commission would have been frustrated in achieving the many other positive benefits to the consuming public which it found would occur upon the unification and integration of Pacific and El Paso.

It is this very type of "sporadic" action by district courts, unconnected and isolated from a comprehensive and continuing regulatory past and future, which interferes with the Commission's present and prospective jurisdiction over rates and services, and which this Court in the *RCA* case[1] condemned:

[1] *United States* v. *Radio Corporation of America*, 358 U. S. 34.

> "The cases [involving the invocation of primary (administrative) jurisdiction] all involved . . . common carriers by rail and water. These carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to have been reasonable. Free rate competition was modified by federal controls. The Court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious. . . . Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance." (358 U. S. 334, 348)

There can be no doubt that, as this Court has said, there is comprehensive and pervasive regulation of the entire natural gas industry, divided only between the Federal Power Commission and State regulatory authorities.[1]

There can be no doubt, as the Court has said on several occasions, that with respect to matters within Federal cognizance the regulatory scheme embodied in the Natural Gas Act is comprehensive and pervasive.[2]

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[1] *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19.

[2] *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 26, 28; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 392; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 467; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 510.

It must be apparent that the "justification" for primary administrative jurisdiction in this case is compelling, and that there is no justification for the contention that it was the Commission's duty to stay its proceeding under Section 7 of the Natural Gas Act until completion of the Clayton Act case.

There is a further and final answer to petitioner's contention embedded in the express provisions of Sections 7(c) and 7(e) of the Natural Gas Act:

> "In all other cases [other than grandfather clause cases] *the Commission shall set the matter for hearing* and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly. . . .
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> • • • •
>
> "(e) Except in the cases governed by the provisos contained in subsection (c) of this section [grandfather clause cases], *a certificate shall be issued* to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, *if it is found* that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that *the proposed service,* sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.*" (56 Stat. 84 (1942)) (emphasis supplied).

It was, as Sections 7(c) and 7(e) of the Natural Gas Act expressly commands, the Commission's duty to set El

Paso's and Pacific's applications down for hearing and decision. Congress has declared in these provisions that any proposal pursuant to Section 7(c) to construct, to extend, to operate or to acquire natural gas facilities subject to the jurisdiction of the Commission shall be declared lawful, if together with fulfillment of the other requirements of the section, that proposal fulfills the broad legislative standard of being required by the public convenience and necessity. Hence it was the clear duty of the Commission to proceed to hear and determine El Paso's and Pacific's applications, without awaiting further proceedings or completion of the Clayton Act case.

Accordingly, based upon our review of the provisions of the Natural Gas Act, the purpose of the Act as reflected in its provisions and as demonstrated in its legislative history, the compelling conclusion, which is supported by decisions of this Court relating to the Natural Gas Act and other analogous regulatory statutes, is that petitioner's theory of "primary antitrust jurisdiction" upon which it bases its contention that the Commission should have stayed its decision until completion of the antitrust proceeding, has no basis whatsoever.

We come now to 1950 when Congress amended Section 7 of the Clayton Act and we shall see that the last paragraph of Section 7 of the Clayton Act, as amended, only corroborates further the conclusions which we have reached.

B. The Provisions of Section 7 of the Clayton Act, as Amended in 1950, in No Way Support Petitioner's Contention of "Primary Antitrust Jurisdiction". Rather, the Provisions of Section 7 of the Clayton Act are a Further and Particularized Expression of a Congressional Intention Regarding the Primacy of Natural Gas Act Standards in the Interstate Natural Gas Industry.

After several years of consideration, Congress, in 1950, amended Section 7 of the Clayton Act. As originally enacted in 1914, Section 7 of the Clayton Act applied

only to stock acquisitions. One of the principal provisions in the 1950 amendment was to bring acquisitions of assets within its terms. Thus, under amended Section 7 of the Clayton Act, acquisitions of stock and acquisitions of assets which will have the probable effect of substantially lessening competition in any line of commerce in any section of the country are declared unlawful.

The last and exemptive paragraph of Section 7 of the Clayton Act provides:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board." (64 Stat. 1126 (1950))

The substance of this paragraph first appeared in a report submitted to Congress in 1939 which recommended various changes in the antitrust laws. The report specifically referred to the Federal Power Commission and to certain other regulatory agencies and explained that the exemption which was proposed would "avoid any conflict between the provisions of section 7 [of the Clayton Act] and the acts administered by the said agencies."[1]

In 1945, a bill was introduced to amend Section 7 of the Clayton Act. It included the exemptive paragraph and explicitly referred to the Federal Power Commission. (H. R. 2357, 79th Cong., 1st Sess. (1945)). This bill went through successive amendments and was finally reported as H.R. 5535, 79th Cong., 1st Sess. (1945). Following hearings,[2]

[1] Letter from Chairman of the TNEC transmitting a preliminary report, S. Doc. No. 95, 76th Cong., 1st Sess. (1939) at p. 21.

[2] Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, on H.R. 2357, 79th Cong., 1st Sess., ser. 8 (1945).

the House Committee report stated, inadvertently omitting reference to the Federal Power Commission though the bill did contain reference to that Commission:

> "The proposed amendments affect only corporations subject to the jurisdiction of the Federal Trade Commission. The jurisdictions and regulatory powers of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Authority, and the Federal Reserve Board in their respective fields remain unchanged." (H. R. Rep. No. 1820, 79th Cong., 2d Sess. (1946) at p. 4)

The proposed legislation, which failed of passage in the 79th Congress, was re-introduced in the 80th Congress as H.R. 515, later reported as H.R. 3736.

During the House hearings held in 1947, the Securities and Exchange Commission suggested that the exemptive paragraph should, insofar as the SEC was concerned, relate only to transactions approved by it under the Public Utility Holding Company Act of 1935. The SEC explained that this statute was the only one administered by it which involved broad consideration of public interest standards in the regulation of transactions which was comparable to the scope of consideration by the other agencies specifically mentioned. (Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary, on H.R. 515, 80th Cong., 1st Sess., ser. 3 (1947), at pp. 232-34).

Mr. Wendell Berge, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, suggested that the entire exclusionary paragraph be deleted because unnecessary:

> "The paragraph . . . refers to transactions consummated pursuant to authority given to various agencies appears to be unnecessary and should be deleted.
>
> "The bill would not affect the powers of the administrative bodies under specific statutes which they administer." (Id. at 241)

Senator Kefauver, one of the sponsors of the bill, responded:

> ". . . the Attorney General has recommended that that whole paragraph . . . be omitted, but all of the agencies involved . . . have specifically asked that this exclusion be placed in the bill, and they fear that with its reenactment without the exclusion might cause some confusion insofar as their power and jurisdiction is concerned. So, I would like to ask that all of the agencies remain excluded as is. . . ." (Id. at 258)

The report of the House Committee on the Judiciary, which was submitted following the close of hearings in 1947, described the exemptive paragraph as follows:

> "The language on page 4, first paragraph, is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of certain agencies. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them." (H. R. Rep. No. 596, 80th Cong., 1st Sess. (1947) at p. 5.)

The House report in 1949[1] on the bill to amend Section 7 of the Clayton Act, H.R. 988 (as finally reported, H.R. 2734) contained substantially identical language as contained in the 1947 report, which is quoted above.

During the course of hearings held in 1949 before a subcommittee of the Senate Committee on the Judiciary, the Securities and Exchange Commission wrote to Senator O'Conor with regard to the last paragraph of the proposed amendment to Section 7 of the Clayton Act:

> "The last paragraph of section 7 is new. It exempts from the provisions of section 7 transactions consummated pursuant to authority given by the ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdic-

[1] H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949) at p. 6.

tion over various types of public utilities, natural monopolies, and quasi-monopolies. The statutes vesting these agencies with a licensing authority over combinations by or affecting such companies take into account the effect of the combination as such on the public interest, and the continued regulatory jurisdiction of the named agencies and in some cases State agencies as well tends in general to prevent abuses inherent in monopoly. These Federal statutes are addressed to the peculiar problems of the industries and corporations involved, and there is no desire to supersede them in this statute of general application, which is designed essentially to fill the gaps in existing law. At the same time it is to be noted that the only transactions exempted are combinations which are passed upon by the named agencies as combinations. . . ." (Hearings Before a Subcommittee of the Senate Committee on the Judiciary, on H. R. 2734, 81st Cong., 1st Sess. (1949) at 142.)

Mr. John Stedman, Chief of the Legislative and Clearance Section of the Antitrust Division of the Department of Justice, agreed with the SEC. He felt, however, that the result was so obvious anyway that there was no real need to include the exemption explicitly. He said:

". . . as I understand the letter, what it says is that this act as it now reads should be made clear, that in those situations where these various agencies have specific authority to regulate who shall and who shall not go into business, who shall merge with each other, and so forth, that with respect to those matters, that under the act they would have jurisdiction and presumably if things were done with approval of those Commissions, that they would not then be subject to action by the Federal Trade Commission or by the Department of Justice.

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"That is my understanding of the content of the letter, and with that understanding, one, I would

agree with what has been said, and, two, I see no objection to it being incorporated into the record. I see no objection to its being included in the report. I would question the need for any actual amendment of the bill for the simple reason that I think that that would be the logical interpretation of the bill then anyway. . . ." (Id. at 143)

During the course of the legislative events which ultimately resulted in the enactment of Section 7 to the Clayton Act, the Surplus Property Board, originally listed as one of the agencies, was dropped at the suggestion of Mr. Wendell Berge, then Assistant Attorney General in charge of the Antitrust Division:

". . . The inclusion of the Surplus Property Board is . . . undesirable since neither the Board nor its successor, the War Assets Administration, has any power to approve mergers or acquisition of competitors.

"The Surplus Property Board sells United States Government property to private corporations. Purchases from it cannot possibly come under the prohibition of Section 7 of the Clayton Act. All transactions consummated under the Surplus Property Act involving property costing a million dollars or more are now referred to the Department [Justice] for advice under the antitrust laws.

"The inclusion of the Surplus Property Board in this section would add serious confusion to the present law and may have the effect of preventing the Department of Justice at some future time from bringing an action under the Sherman Act seeking to divest a company of assets, including surplus property, that had been used in an illegal monopolistic scheme. War Assets has no supervisory authority over the use of surplus property after it has been sold.

"The other agencies, of course, all are regulatory bodies." (Hearings, House Committee on the Judiciary, on H. R. 515, 80th Cong., 1st Sess. (1947) at 241)

The question which is relevant in this case[1] is whether the enactment of the amendment to Section 7 of the Clayton Act in any way altered Congressional intention regarding regulation of the interstate natural gas industry, the role of competition in that industry, and the role of the Commission in controlling and regulating competition.

To the contrary of petitioner's contentions, and as we have seen, the legislative history of the last and exemptive paragraph[2] of the 1950 amendment to Section 7 of the Clayton Act shows continuing Congressional intention to reserve to the Commission all of the powers entrusted to it under the Natural Gas Act of 1938, as amended in 1942.

Moreover as the Department of Justice believed during the legislative hearings preceding the enactment of the amendment of Section 7 of the Clayton Act, the last paragraph of Section 7 of the Clayton Act was simply declaratory of existing law.

The reasoning supporting this conclusion is both general and specific. The general principle is that the Natural Gas Act entrusted to the Commission comprehensive and pervasive regulatory authority over the interstate natural gas industry. The total comprehensive and pervasive regulation of the entire natural gas industry would be achieved by the combination of Federal and state regulation.

The specific principle is that once the certificate had been issued to El Paso to acquire and to operate Pacific's facilities, it became unlawful and is unlawful for El Paso to abandon such operation, except with the authorization of the Commission based upon the public convenience and necessity or because adequate natural gas supplies are no

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[1] The precise question of the effect of the Commission's final order upon the Clayton Act suit is not now before this Court. The question will, as the District Court held on October 10, 1958, come before that Court if the Commission's order is upheld; and it will then be determined.

However, we believe that it is evident from the various materials reviewed in this brief that if this Court affirms the decision of the Court of Appeals, and the Commission's order thereupon becomes final, the Clayton Act case can no longer be maintained.

[2] See *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U. S. 458, 469-70.

longer available to support continued operation. Section 19(b) of the Natural Gas Act.

Certainly, Congress has not enacted two statutes which may be so construed that under one, the Natural Gas Act, it would be *unlawful* for El Paso *to discontinue* operating Pacific's facilities and under the other, the Clayton Act, it would be *unlawful* for El Paso *to continue* operating Pacific's facilities.

One of the several critical differences between the result here and the result in the *RCA* case,[1] is that a license granted to operate a television station imposes no duty upon the licensee to continue operation. The television station operator violates no law when he abandons operations, whereas the natural gas pipeline company commits an unlawful act when it abandons pipeline operations without Commission authorization.

This Court had the occasion to deal with similar problems in the *Penn Water* case.[2]

The appellant there challenged the order of the Federal Power Commission issued pursuant to the Federal Power Act under which certain rates were reduced and Pennsylvania Water was required to continue to buy, sell and transmit power to Consolidated in a coordinated manner. This manner of service was initiated pursuant to a 1931 contract between Penn Water and Consolidated. After the enactment of the Federal Power Act in 1935, this manner of service was required by order of the Commission, which regulates interstate electric utilities under the jurisdiction conferred in that Act.

Penn Water's attack on the Commission's order in this Court was based on a holding by the United States Court of Appeals for the Fourth Circuit that certain phases of the contract between Penn Water and Consolidated violated the Sherman Act.

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[1] *United States* v. *Radio Corporation of America*, 358 U. S. 334.

[2] *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414.

This Court affirmed the Commission's order, pursuant to which *inter alia*, Penn Water was required to continue operations in a coordinated manner with Consolidated. The Court held that the Commission had not premised any of its findings upon "the assumed existence and continuation of this contract". (343 U. S. at 422.) Likewise, the Commission here did not premise any of its findings on the continued existence of the parent-subsidiary relationship between El Paso and Pacific.

The Court held that Penn Water was not being required to yield to any contractual terms subjecting it to the control of Consolidated. Likewise, El Paso's merger with Pacific and El Paso's *operation* of Pacific's facilities . . . were not the result of Pacific yielding to the terms of any merger contract between El Paso and Pacific—but by reason of the Commission's order. As Mr. Justice BLACK stated:

> "To the extent that Penn Water is being controlled, it is by the Commission, acting under statutory authority, not by Consolidated, acting under the authority of private contract terms 'legalized' by the Commission. The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts." (343 U. S. at 422)

Likewise, El Paso's duty to continue to operate Pacific's facilities springs from the Commission's authority, not from any agreement between El Paso and Pacific (though controlled by El Paso) to propose to the Commission that they be merged. Moreover, as pointed out earlier, Section 7(b) of the Natural Gas Act makes it unlawful for El Paso hereafter to abandon the operation of Pacific's facilities, unless upon express Commission authorization.

Thus, in the *Penn Water* case, a contract precedent to the issuance of the Commission's order had been *held* to violate the antitrust laws, and the Court found that fact irrelevant. The Commission, charged with determining what was in the public interest, issued an order which was

within its jurisdiction; and it was Penn Water's and Consolidated's duty to operate pursuant to that order. It was unlawful for them to do otherwise.

Rather than following the procedures set forth in the Federal Power Act, Penn Water ". . . tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order" (343 U. S. at 424) which this Court would not permit.

Likewise, petitioner cannot rely on the pending antitrust suit to nullify the Commission's order certificating the unification and integration of El Paso and Pacific on a finding that it is required by the public convenience and necessity.

It also should be noted that the Federal Power Act, like the Natural Gas Act, contains no express Commission power to exempt from the antitrust laws transactions or activities consummated or carried on pursuant to Commission orders. Any requirement that activities carried on pursuant to Commission's orders are not exempt from the antitrust laws unless the Commission involved has the specific power to immunize would make no sense in the context of the type of regulation provided under these acts and would create a continuing uncertainty as to whether activities in pursuance of such orders were lawful.

Without taking any of the foregoing into account, petitioner finds alleged support for its argument in the grant of power which has been given to certain agencies, such as the Interstate Commerce Commission both as to motor carriers and as to railroads, to decide whether particular activities or transactions violate the antitrust laws or to decide whether to immunize particular transactions from the antitrust laws.

For example, petitioner attempts to distinguish the *McLean* decision of this Court on the ground that the Interstate Commmerce Commission had the express power "to immunize transactions otherwise unlawful as violative

of the antitrust statutes". (Pet. 35).[1] But "quite apart" from that exemptive power, the Court held that antitrust laws determine "the public interest" in railroad regulation only in a qualified way" (321 U. S. 67, 83).

As the Court in the *McLean* case said:

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action." (321 U. S. at 79-80)

The extent to which Congress has required particular regulatory agencies to consider the impact on competition "will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the

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[1] Petitioner also seeks to avoid and circumvent the unavoidable impact of the *McLean* decision by asserting that the Interstate Commerce Commission is specifically enjoined not to approve mergers as "will . . . unduly restrain competition", a phrase which is contained in Section 5(1) of the Interstate Commerce Act. (Pet. 35).

However, Section 5(1) applies only to "pooling; division of traffic, service or earnings" and not to mergers. Mergers and consolidations, such as the one involved in the *McLean* case, are governed by Section 5(2) where no such language is contained.

Commission is primarily and directly concerned" (321 U. S. at 80).

Thus, Commission regulation of pipelines pursuant to the Natural Gas Act, under which the Commission has no "duty or . . . authority" to enforce compliance with any of the antitrust laws, is an instance where Congress intentionally has not "leavened" the various provisions of the Act with the policies of the antitrust laws quite to the same extent as it may have done in the railroad or motor carrier fields. The amount of leavening "will vary from instance to instance." (321 U. S. at 79-80).

The plain conclusion is that the absence of Commission power to decide under the Natural Gas Act whether a particular transaction within the Commission's jurisdiction may violate the Clayton Act or the Sherman Act indicates Congressional intention that such a precise decision is an unnecessary and academic one, though consideration of effect on competition may be a relevant factor to be weighed with others in a particular case. In the context of the comprehensive and pervasive character of natural gas regulation, the Commission need not decide whether a transaction or activities within the Commission's jurisdiction may violate the Clayton Act or the Sherman Act, since in any event the Commission may authorize them because required by the public convenience and necessity.

The precise question before the Court here involves Section 7 of the Clayton Act. And, in that respect, even though the proposed unification and integration of the two companies was preceded by a stock acquisition about which there is an undecided question of whether the stock acquisition offended the standards of the Clayton Act, the Commission may nonetheless authorize the proposal without deciding the Clayton Act question, if it finds that the proposed unification is required by the public convenience and necessity under the Natural Gas Act and so long as it had taken into account the consequences of the *facts* relat-

ing to impact on competition as one of the several factors weighed.

This conclusion is further reinforced by the decisions of this Court in the *McLean* and *Minneapolis* cases where the Court rejected the view that any consolidation or merger of motor carrier or railroad companies which might violate the antitrust laws can not be authorized by the Interstate Commerce Commission.[1]

We have reviewed the histories of El Paso and Pacific under continuing Commission regulation, the particular problems which they and their ultimate consumers faced in respect of continuing and dependable natural gas service at just and reasonable rates; the positive public benefits which the Commission found will flow from the unification and integration of El Paso and Pacific; the consideration given by the Commission to the impact on competition; the pertinent provisions and legislative history of the Natural Gas Act and of Section 7 of the Clayton Act; and the decisions of this Court relating to the Natural Gas Act and other analogous regulatory statutes.

In that light it is suitable to conclude our discussion relating to the Natural Gas Act, the Clayton Act and competition with the particularly pertinent observations of this Court in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91-93:

> "That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute. . . .
>
> "Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may

[1] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 85-86; Minneapolis & *St. Louis Railway Co.* v. *United States*, 361 U. S. 173, 187.

have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office, cf., e.g., 17 Stat. 292 (criminal offense to establish unauthorized post office; provision since superseded), and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads. . . .

"Federal legislation affecting railroads is a familiar but far from unique example of those many areas of economic activity in which serious inroads have been made on an original policy favoring competition. Indeed, as to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard. In this field, the reason for such restriction undoubtedly lies primarily in the limited availability of international communication facilities, recognized in a series of international conventions. Other considerations may also have applied: Congress may have considered the possible inconvenience to the public

> of duplicate facilities—as would more clearly be the case with telephones—or the possible inadequacy of the demand for international communications to make more than one enterprise economically or socially desirable. *Whatever the reasons, they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.*" (emphasis supplied)

The Court of Appeals rejected the contention advanced by the Department of Justice as amicus curiae that the Commission should have stayed its proceedings until completion of the antitrust case.

The Court of Appeals did so on the ultimate ground that "Congress intended this authority [granted to the Commission under Section 7 of the Natural Gas Act] to be real and effective". (JA 1445).

Here, the same contention advanced by petitioner should, as we have shown, be rejected on the same ultimate ground.

POINT IV

Petitioner is precluded under Section 19(b) of the Natural Gas Act from urging the objection here that the Commission should have stayed its proceedings until completion of the antitrust case. Petitioner did not urge that objection before the Commission in its application for rehearing.

There are other fundamental principles of administrative law and proper judicial procedure which in the circumstances of this case compel the same conclusion.

A. The Requirements of Section 19(b) of the Natural Gas Act Have Not Been Fulfilled by Petitioner.

The pertinent provision of Section 19(b) of the Natural Gas Act is that

> "no objection to the order of the Commission shall be considered by the court [of Appeals][1] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . ." (52 Stat. 831-32 (1938))

This provision is identical with the provisions of Section 313(b) of the Federal Power Act of 1935, 49 Stat. 860 (1935), the only other statute which contains this precise language and this precise limitation upon appellate jurisdiction.

In *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, this Court construed Section 19(b) to have the plain meaning of its words.

The questions presented here, therefore, are: (1) did petitioner urge the objection in its application for rehearing? (2) if it did not, is there any reasonable ground for failure so to do? The answers to the both questions are in the negative.

Petitioner's application for rehearing from the order of December 23, 1959 contains no objection to the issuance of that order on the ground that the Commission should have stayed its proceedings pending completion of the final determination of the antitrust case. Nor does the application for rehearing contain any language which can be construed to amount to such an objection.

Petitioner, in its brief on the merits, does not make any arguments to support any claim that it may now advance the objection involved. However, petitioner did in its reply brief (to respondents' briefs in opposition to the petition for a writ of certiorari) filed with this Court on October 9, 1961, advance two arguments on this question.

Petitioner claimed first that the requirements of Section 19(b) had been fulfilled because in its application for rehearing it had objected to the Commission's decision of

[1] The Court's brackets in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 497-498.

December 23, 1959 on the ground that: "the decision erred in disposing of the antitrust issue when it adopted the reasoning of the examiner's report that an administrative agency can dispose of such an issue [the antitrust issue] even as against later judicial determination". (JA 1345). (Quoted in petitioner's reply brief, p. 7).

But this contention is precisely the opposite of the contention that the Commission should have stayed its proceedings pending final determination of the antitrust case. This is so because if the Commission could not, as petitioner argues, dispose of the antitrust issue "even as against later judicial determination", a Commission hearing and decision could not interfere with the District Court's powers in the antitrust case; and the premise of petitioner's contention that the Commission should have stayed its proceeding, is that otherwise, there would be an interference with the District Court's powers.

In its reply brief, petitioner also claimed in its reply brief of October 9, 1961 (p. 7) that "the assignment of error [in its application for rehearing] was definite enough to give the Commission a chance to rule on it [the objection to the issuance of the Commission's order before completion of the antitrust case]". Petitioner relied on the following, but obviously unrelated objections which were set forth in its application for rehearing:

> "[the decision contained] . . . easily stated conclusions and generalities relating to . . . antitrust questions, all of which are offered unsupported by sufficient evidence and *under no standard or norm for a case like this.*" (JA 1350)

"and that

> ". . . The merger was not sought to meet the public convenience and necessity but, as the evidence shows, to frustrate action of the Department of Justice of the United States of America under Section 7 of the Clayton Act." (JA 1350) [Petitioner's emphasis]

The latter claim that El Paso and Pacific allegedly sought to achieve the merger in order to "frustrate action of the Department of Justice", in no way frames a question that the Commission should have stayed its proceedings.

That such an allegation was "specific enough" to permit the Commission to rule on that objection becomes patently absurd when the Attorney General of California's motion of September 8, 1958 is recalled. That motion, eleven pages in length, JA 1135-45, set out the objection specifically and elaborately. The concluding words were: "It is earnestly requested . . . that the present hearing be adjourned to a date when the anti-trust issues shall have been resolved." (JA 1145).

It is clear that after September 15, 1958, when the Commission issued its order denying the motion of the Attorney General of California to stay proceedings pending completion of the antitrust case, the Attorney General of California abandoned his objection. (JA 1147-48).

For example, the Presiding Examiner held specifically that despite the pendency of the antitrust case

> "El Paso still has the right, as a regulated natural gas company, to come before this Commission and request a determination of the issue of whether, under all facts and circumstances, its acquisition of the facilities of Pacific is in the public interest." (JA 1183)

Petitioner did not contend in its exceptions to the Presiding Examiner's decision or during the oral argument held before the Commission that this holding by the Presiding Examiner was improper. Petitioner presented no argument to the Commission in its Exceptions or during the oral argument that the Commission should withhold its decision pending completion of the antitrust case.

Petitioner's exceptions to the decision of the Presiding Examiner and its application for rehearing argued solely

to the question of whether the Presiding Examiner and the Commission, respectively, could properly find that the unification and integration of El Paso and Pacific fulfilled the standard of public convenience and necessity. (JA 1277-89, 1340-51).

The fact that the Attorney General of California had previously moved to stay Commission proceedings until completion of the antitrust case is of no avail to petitioner. First, petitioner did not file an application for rehearing from the Commission's order of September 15, 1958 denying that motion. Second, the application for rehearing which was filed in 1960 made no claim that the September 15, 1958 order was erroneous. (JA 1340-51). Third, the petition to review filed in the Court of Appeals did not seek review of the Commission's order of September 15, 1958. (JA 1361-65).

As this Court has held with respect to the provisions of Section 10(c) of the Administrative Procedure Act, which are less rigid than Section 19(b) of the Natural Gas Act:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *L. A. Tucker Truck Lines*, 344 U. S. 33, 36-37.[1]

The last "opportunity for correction" of the Commission's decision is the time when the Commission considers an application for rehearing. "The plain purpose", of Section 19(b) of the Natural Gas Act "is to give the Commission an opportunity to rule upon any matter which is to be relied upon on review". *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 749 (D. C. Cir.).

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[1] Quoted with approval in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 500.

In its application for rehearing, petitioner did not urge as an objection to the Commission's order of December 23, 1959 that the Commission should not have issued that order because it should have stayed its proceedings until the completion of the antitrust case. Petitioner can make no claim that there was "reasonable grounds for failure so to do".

Accordingly, as prescribed by Congress, petitioner can not here advance that objection.

B. Petitioner's Contention That the Commission Should Have Stayed Its Proceeding Until Completion of the Antitrust Case is Not Before the Court Because of Other Fundamental Principles of Administrative Law and Proper Judicial Procedure.

During the District Court hearings held in October of 1957, the Attorney General of California supported El Paso's alternative motion to stay proceedings in the antitrust case until completion of the Commission proceedings, although he did not support El Paso's motion to dismiss the complaint of the Antitrust Division.

Petitioner "cannot now be allowed to attack" a result which it previously urged and supported. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 502. Albeit that petitioner did not achieve any "benefits" as a consequence of that earlier position, and albeit the Attorney General of California appeared in the District Court as an *amicus curiae*, "the impropriety [of petitioner's present attack] . . . is rendered twofold" because it now takes a position in the separate Commission proceedings exactly to the contrary to the position it took in the antitrust case. (348 U. S. at 502).

Petitioner cannot undo what the Attorney General of the United States has decided to acquiesce in, or not to do, in the District Court case.

On September 5, 1958, the Antitrust Division of the Department of Justice served a motion in the District Court seeking to enjoin El Paso and Pacific from participating in the then forthcoming Commission proceedings. In the alternative, the Antitrust Division moved to enjoin El Paso and Pacific from consummating the merger in the event the Commission should issue the requisite order under Section 7 of the Natural Gas Act.

On the following day, the Antitrust Division withdrew its motion to enjoin El Paso and Pacific from participating in the Commission proceedings. The consequence of petitioner's present contention would be, in effect, to reinstate the motion of the Antitrust Division which the Division voluntarily decided to withdraw, and to have that motion granted by this Court in a different proceeding.

On September 6, 1958, the Antitrust Division's alternative motion to enjoin El Paso and Pacific from consummating its merger in the event of the issuance of the requisite Commission order was denied by the District Court. On October 10, 1958, after the Commission had deferred its judgment to the District Court as to which proceeding should be completed first, the District Court continued the antitrust case until "final determination" of the Commission's case. The Antitrust Division decided not to seek appellate review of either decision. A year later, the Antitrust Division decided not to seek to enjoin the consummation of the merger pursuant to the order which the Commission issued.

Petitioner cannot arrogate to itself the function of the Attorney General of the United States in the District Court antitrust case and then seek affirmative relief from this Court in this proceeding from the very acts and decisions of the Attorney General of the United States in that case.

POINT V

None of petitioner's contentions that it was denied "procedural due process" has any basis in fact or in law.

Petitioner contends that it was denied "procedural due process" in six different respects:

(a) That there was an alleged failure to delineate issues at the outset of the case and an alleged failure during the hearings to indicate the relevancy of evidence; (Pet. 53-54)

(b) That petitioner was allegedly denied the opportunity to cross-examine on material issues; (Pet. 41)

(c) That there was an alleged failure by the Presiding Examiner and the Commission to consider the evidence before they rendered their decisions; (Pet. 25, 27, 50-53)

(d) That allegedly the Presiding Examiner and the Commission improperly took "official notice" of the Commission's decision in the *Transwestern* case and the pendency of the applications for certification of the "PGT" project; and that there was an alleged failure to allow petitioner to present evidence in rebuttal to the facts allegedly officially noticed; (Pet. 28, 55-56)

(e) That there was an alleged failure by the Commission to give adequate time to the consideration of the case before issuing its decision and order; (Pet. 49, 53) and

(f) That El Paso allegedly made ex parte communications to the Commission for the purpose of securing a prompt Commission decision in this case. (Pet. 26, 28, 53, 62).

A. Petitioner had a full opportunity to understand and to try to meet the evidence and contentions of El Paso and Pacific during the hearings.

Petitioner complains that the introduction by applicants of a great mass of information, as in this case where 500 exhibits and items were introduced and received (many of them required by the Commission's Rules), is disasterous to "protestants and intervenors" because there is no way to know which of the "precise contentions of our adversaries . . . the Commission will consider determinative". Petitioner contends, therefore, there was no way to know which of the applicants' points to rebut. (Pet. 54).

Petitioner says, presumably with reference to its alleged position in this case before and during the hearings, "we [were] put in the position of playing a guessing game, of playing 'blindman's buff' ". (Pet. 54).

There is no basis whatsoever for these claims.

To each of the applications of El Paso (which is 29 printed pages in the record, JA 1087-1115) and of Pacific (which is 17 pages printed in the record, JA 1071-87) were attached voluminous exhibits and documents, all in compliance with Section 157.5 through Section 157.16 of the Commission's regulations under the Natural Gas Act. (JA 1084-85, 1107-09).

Each application consisted of several sections including, for example, in the El Paso application:

> "5. El Paso's Need for the Facilities to be Acquired
>
> • • • • •
>
> "8. El Paso's Ability and Willingness Economically and Efficiently to Operate [the] Facilities of Pacific
>
> "9. Grounds of Public Convenience and Necessity." (JA 1095-98, 1101-07)

In Section 9, the most substantial portion of El Paso's application, El Paso described in summary form the many positive and distinct benefits to the consuming public which

El Paso believed and which it proposed to show would result from unification and integration of El Paso and Pacific. (JA 1101-07). These positive benefits were described in five separate categories, and certain subcategories thereto.

Well before the opening of hearings before the Presiding Examiner, the Attorney General had before or available to himself or his counsel copies of El Paso's and Pacific's applications, which specifically described the grounds of public convenience and necessity which they proposed to prove.

As the Presiding Examiner quite properly held and observed on the first day of the hearings, the applications of El Paso and Pacific, and the opening statements made by counsel for various parties, were to be considered as "pleadings". (JA 7; R. 17, 40).

However, only one "issue" was defined by any party other than El Paso and Pacific. That was the issue of "competition" tendered by counsel for the Attorney General of California. The Staff of the Commission did not and was not required under the rules of the Commission to take a position at the outset of the hearings. (JA 5-8).

In this and similar administrative proceedings, where issues are not required to be defined at the outset of hearings, the applicant must bear the burden of proving each matter which it contends supports the application, whether or not any other party asserts a contrary position. The applicants in this case, El Paso and Pacific, had to bear the burden of proving that their proposal fulfilled the standards of public convenience and necessity. They, of necessity, had to present evidence relating to every conceivably relevant matter, lest, after the hearings were closed, some party (such as petitioner or the Staff in this case) might contend that there has been a failure of proof in various regards. (JA 1159).

Thus, contrary to petitioner's contention, "protestants and intervenors" are in a peculiarly advantageous posi-

tion to "sharpshoot" after the hearings have been closed. Particularly noteworthy is the fact that petitioner's grounds for opposition to the merger expanded tremendously after the hearings were closed. (JA 1277-89).

Petitioner's contention that it was required to play the game of "blindman's buff" (Pet. 54) is groundless for another reason. El Paso and Pacific put on their case in support of the application from September 17, 1958 through September 26, 1958. The Presiding Examiner then granted a six-week recess in order to provide ample time for the other parties to prepare their cross-examination; during that period only one day of hearings was held and that was to accommodate a witness who was then engaged in a business project in South America. (R. 1019-A-1019-B, 1100-02).

Petitioner's contention that it was deprived of due process by the Presiding Examiner's failure to delineate the relevancy of the 500 exhibits and items by reference which he received also is unjustifiably and unwarrantedly made.

As previously described, many of the exhibits and items were required to be introduced and received as evidence under the Commission's regulations. Over 300 such exhibits were gas sale contracts and service agreements.

No objection was made by any party to the receipt in evidence of these exhibits and items. In particular, the Attorney General of California, by its counsel, made no such objections.

Certainly, in an administrative proceeding which by its nature is more widespread in scope than a judicial proceeding, the hearing officer, as the Presiding Examiner in this case, is not required to rule on the materiality of each exhibit which is offered into evidence, unless an objection is made to its receipt in evidence. Moreover, since parties other than the applicants are not required to create issues or state their objections until the close of the hearings, it would be impossible for the hearing officer to determine the materiality of each exhibit.

Petitioner, in this and several other contentions relating to alleged denial of procedural due process, seems to view this case as if it was founded entirely on documentary evidence, whereas there were some 23 days of oral testimony on direct and cross-examination.

Petitioner's contentions that it was denied procedural due process because of the failure to delineate issues and, the failure of the Presiding Examiner to indicate the relevancy and materiality of each exhibit received in evidence are wholly without basis in fact or in law.

The meaningless character of petitioner's contentions is illustrated by the fact that they were never advanced by the Attorney General of California in his brief to the Presiding Examiner, or in petitioner's exceptions to the decision of the Presiding Examiner, or in petitioner's application for rehearing. They were advanced for the first time in the Court of Appeals and, accordingly, under Section 19(b) of the Natural Gas Act petitioner is precluded from appellate review of them.

In affirming the decision of the Commission, the Court of Appeals did not bother to discuss these contentions.

B. The Attorney General of California was not denied any cross-examination during the hearings before the Presiding Examiner.

Petitioner complains that during the hearings it was allegedly denied cross-examination relating to the economic impact of the merger, particularly upon costs and rates. (Pet. 41, 40). Petitioner makes no reference or citations to any portion of the record to support this allegation. Petitioner's present complaints were never made to the Presiding Examiner or to the Commission during or after the hearings, and not until the case was before the Court of Appeals. Accordingly, petitioner is precluded under Section 19(b) of the Natural Gas Act from raising these unfounded contentions.

In the Court of Appeals, petitioner did make specific reference to two portions of the record where, said petitioner in its brief submitted to the Court of Appeals, the Presiding Examiner allegedly made rulings foreclosing cross-examination which counsel for the Attorney General of California was then pursuing or wanted to pursue.

Respondents showed in their briefs that the first alleged ruling of the Presiding Examiner was not in fact made and that counsel for the Attorney General of California pursued his cross-examination until he voluntarily and of his own accord changed to another subject; and that, in the second instance, no cross-examination by the Attorney General for California was involved and the specific ruling which was made by the Presiding Examiner was not objected to by any party and all of the parties seemed to agree with the Presiding Examiner's conclusion which came at the end of a long colloquy among various counsel. (See pp. 105-107, supra).

The Court of Appeals properly and without discussion rejected petitioner's contentions concerning the alleged denial of cross-examination, which deserved no discussion.

C. There is no basis whatsoever for petitioner's contention that the Presiding Examiner and the Commission failed to consider the evidence.

Petitioner quotes from a portion of the remarks made by Presiding Examiner Kelly in a later and wholly unrelated proceeding, which purportedly supports petitioner's contention that the Presiding Examiner failed to consider the evidence.

What the Presiding Examiner said was as follows:

> "I just got through writing a decision back in November in the El Paso merger case, where it absorbed the Pacific Northwest Transmission Company. No intervenor opposed the merger except the State of California. The only issues the State of California made at the outset of the hearing was, we

don't want just one pipeline bringing gas into the State of California.

* * * * *

". . . There wasn't a major or even substantial variance between [El Paso's and Pacific's] proof and the averments made in [their] two applications, and I cannot be told that any party who wanted to make an issue, any kind of an issue in relation to that, could not have done it prior to the hearing, or at least at the outset of the hearing, by making some statement upon this record orally.

"Careful lawyers, like Mr. Littman was talking about, overdoing their case, careful lawyers presented 429 exhibits in that case, physically handed in to the reporter. There were 71 Items by Reference, making an equal 500 documents that were to be considered in that case.

"I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.

"Now, that is what I am talking about, all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are."[1]

In these generalized remarks, the Presiding Examiner said that he had "searched the record" for those things that were dispositive of the issues in this proceeding—which on its face shows that the Presiding Examiner did consider all of the documentary evidence and then proceeded to read carefully only those exhibits which were material to the issues which he had to decide.

Before rendering his decision, the Presiding Examiner was present and conducted all of the hearings, at which more than 25 witnesses testified.

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[1] Transcript pp. 582-85, March 14, 1960 hearing in *Panhandle Eastern Pipe Line Co.*, F.P.C. Docket No. G-19780.

After the hearings were closed, he received briefs from the applicants, from the Staff of the Commission, from the petitioner and from several other parties. These briefs included extensive abstracts of the evidence, as the particular parties viewed such evidence.

The Presiding Examiner's comprehensive and lengthy opinion reflects on its face the careful consideration which he gave to the evidence, to the contentions of all of the parties and to the law.

Petitioner's claims of alleged failure by the Presiding Examiner and the Commission to consider the evidence are without basis in fact.

The Court of Appeals did comment and expressly reject petitioner's contentions in this regard:

> "California argues that the Examiner failed to accord it due process, in that he failed to give proper consideration to the record. Upon another occasion, in another proceeding, the Examiner remarked upon the needless volume of the record in this case. He said that, out of some 500 exhibits, between 15 and 25 were dispositive of the issue and there was no occasion to examine any more. He referred to 'all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are.' We think the Examiner's remarks were both apt and appropriate. The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it." (JA 1445)

The decision of the Court of Appeals and its remarks were also both apt and appropriate.

D. There is no "official notice" issue in this case.

In its application for rehearing, petitioner complained for the first time that the Presiding Examiner and the Commission erred when they took official notice of the fact that the Commission, in another proceeding, had granted a cer-

tificate to Transwestern and that applications for certification of the PGT project were pending.

The Commission held that this contention could not be raised in an application for rehearing because it had not been urged by petitioner in its exceptions to the decision of the Presiding Examiner. (JA 1356) Section 1.31(c) of the Commission's Rules precludes a party from urging an objection in an application for rehearing where such an objection could have been but was not urged by that party in its exceptions to the decision of the Presiding Examiner. See *State of Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 186-87 (D. C. Cir), certiorari denied, 345 U. S. 934.

Petitioner at no point advances any reason for the alleged impropriety of the Presiding Examiner's and Commission's cognizance of the Commission's decision in the *Transwestern* case and the pendency of proceedings in the *PGT* case. Petitioner relies solely on Section 7(d) of the Administrative Procedure Act, which provides:

> ". . . Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." (60 Stat. 242 (1946))

In its application for rehearing petitioner claimed the Commission and the Presiding Examiner had erred in taking official notice of the *Transwestern* and *PGT* cases.

But petitioner did not request the Commission to reopen proceedings for the taking of additional evidence; petitioner made no offer to submit evidence; and it made no attempt to assert what showing it could or wanted to make to rebut the matters of which official notice was taken.

The facts are, as the Commission observed in its decision denying the application for rehearing, that there was substantial testimony and evidence introduced in the hearings relating to the competitive impact, past and future, of

the Transwestern and PGT projects. This evidence was explored upon cross-examination by petitioner's counsel among others. (JA 1356; see pp. 110, 112 supra).

The Presiding Examiner made findings on the evidence relating to Transwestern and PGT, and their significance to natural gas service to California.

The official notice taken by the Commission simply fortified the findings made on the evidence.

Petitioner's original and sole objection to the unification of El Paso and Pacific, that California should not be served by one out-of-state pipeline supplier, has been satisfied. Three interstate pipeline companies, all of which have been certificated by the Commission, now serve California.

The Court of Appeals rejected petitioner's contentions concerning "official notice" but found no need, as there was none, to discuss them.

E. Petitioner's contention that the Commission decided the case too promptly is without basis in fact or in law.

In its order denying petitioner's application for rehearing, the Commission considered and properly rejected petitioner's contention that the Commission had decided this case too promptly (JA 1357-58). The Court of Appeals also properly rejected the same contention, and found it unnecessary to discuss it.

The facts are that the Presiding Examiner issued his decision on November 20, 1959, some eleven months after the hearings were concluded and more than five months after the last reply brief was filed.

Promptly after the filing of the Presiding Examiner's decision, El Paso filed a motion with the Commission urging the Commission to hear and decide the case promptly. The reason for this motion was, that if the Commission were to decide in favor of the proposed unification of El Paso and Pacific, a substantial portion of Pacific's $9 million 1955 tax loss carry-forward would be lost unless

the merger were consummated on December 31, 1959. There was therefore an additional and special reason for prompt and special attention by the Commission to this case. (JA 1241-42).

The Commission decided the case more than a month after the issuance of the Presiding Examiner's careful review of the evidence and comprehensive decision, and thirteen days after it heard a full day of oral argument on the exceptions filed with it.

This may be compared with the procedure followed in two major proceedings, in which the Commission issued certificates, over opposition, within a month after the close of hearings, and without the benefit of an Examiner's decision. The objection that the Commission decided those cases too quickly was rejected upon review. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 648 (D.C. Cir.), *certiorari denied*, 356 U.S. 959; *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 1, 7, aff'd. sub. nom. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881, 884 (D.C. Cir.), *certiorari denied*, 335 U.S. 854.

F. Petitioner's unwarranted contentions regarding ex parte contracts which were zealously urged in the Court of Appeals and as zealously renewed here, were not dignified with discussion by the Court of Appeals and warrant the same type of rejection by this Court.

Petitioner's allegations of ex parte communications by representatives of El Paso with members of the Commission are purportedly based on the transcript of hearings held before a House of Representatives Subcommittee during May of 1960. The Subcommittee inquired into conversations which numerous representatives or employees of many companies had with members of the Commission concerning business or social affairs.

Petitioner unequivocably asserts that representatives of El Paso made ex parte communications *during this case* to

Commissioners, in the course of which El Paso urged that the Commission decide the case more promptly. (JA 53).

Petitioner also alleges that it was deprived of due process because there is no way of determining what arguments were presented to the Commissioners during these alleged ex parte contacts. (JA 66).

The testimony of the four members of the Commission was given before the House Subcommittee during May of 1960, and received widespread publicity generally and throughout the natural gas industry. Although petitioner filed its initial brief in the Court of Appeals some five months later in October 1960, it elected not to make its accusations in that brief. Instead, such accusations were made for the first time in its reply brief filed in December 1960.

At the oral argument before the Court of Appeals, petitioner's counsel zealously argued the contentions which are renewed here. The Court received from petitioner the entire transcript of the House Subcommittee hearings, some 700 pages of testimony.

The Court received from El Paso a brief summary and extract of the testimony which in any way related to El Paso and Pacific. (JA 1367-1418). The Court also received from petitioner such additional references and extracts from that testimony as the petitioner wished to call to the Court's attention. (JA 1418-1433).

The sum of all the sworn testimony by each of the four members of the Commission who testified, and who were the same members of the Commission who decided the El Paso-Pacific case, is as follows:

1. Chairman Kuykendall testified to no conversations with any El Paso or Pacific representatives. (JA 1368, 1370).

2. Commissioner Kline testified with respect to conversations with one Pacific representative and

one El Paso representative, neither of whom discussed the merger case. (JA 1370-71, 1375-76).

3. Commissioner Connole testified that no El Paso or Pacific representative ever communicated to him concerning the merger case. (JA 1382).

4. Commissioner Stueck testified that only one El Paso or Pacific representative ever talked with him and such representative never discussed any litigated matters with him. (JA 1403).

Petitioner's specific as well as its vague accusations of alleged impropriety by El Paso are baseless.

El Paso and Pacific did in fact urge the Commission to act promptly in this case. But they did so by motion filed by the Commission and served on all of the more than forty parties. (JA 1241-43).

In every instance which has come before the Court of Appeals for the District of Columbia Circuit, which raised any real question of alleged ex parte impropriety in administrative proceedings, that Court has been particularly alert to such matters. In each such case it has ordered that appropriate action be taken, either a hearing or reversal of the agency's order.[1]

With the complete record before it upon which petitioner based its contentions, the Court of Appeals appropriately rejected them without dignifying them with discussion.

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[1] *WKAT, Inc.* v. *Federal Communications Commission*, F. 2d (D.C. Cir., July 6, 1961); *Massachusetts Bay Telecasters, Inc.* v. *Federal Communications Commission*, 295 F. 2d 131 (D.C. Cir.); *United Air Lines, Inc.* v. *Civil Aeronautics Board* (together with *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, 281 F. 2d 53 (D.C. Cir.); *Sangamon Valley Television Corporation* v. *United States*, 269 F. 2d 221 (D.C. Cir.); see 358 U. S. 49. See also the recent decision, *Neisloss* v. *Bush*, 293 F. 2d 873 (D.C. Cir.).

Conclusion

The Commission accorded the parties a fair hearing. It made findings based on substantial evidence and properly exercised its judgment in concluding that the unification and integration of El Paso and Pacific were required by the public convenience and necessity. In rendering that decision the Commission fulfilled all statutory requirements. It carried out the duties imposed upon it by Congress in the Natural Gas Act and it fulfilled Congressional purpose.

The Commission has produced a sound result. That result is in no way arbitrary.

The Court of Appeals properly affirmed the orders of the Commission for which appellate review was sought by petitioner.

Accordingly, the decision of the Court of Appeals should be affirmed by this Court.

Respectfully Submitted,

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January 25, 1962

APPENDIX A

Relevant Portions of Statutes and Rules Involved

Sections 7(b), 7(c) and 7(e) of the Natural Gas Act of June 21, 1938, 52 Stat. 825, as amended 56 Stat. 83 (1942); 15 U.S.C. §§ 717f(b), 717f(c) and 717f(e).

"EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

* * * * *

"(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act [February 7, 1942], over the route or routes or within the area for which application is made and has so operated since that time, the

Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act [February 7, 1942]. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience

and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Section 19 of the Natural Gas Act of June 21, 1938, 52 Stat. 831, as amended 62 Stat. 991, 992 (1948), 63 Stat. 107 (1949), 72 Stat. 947 (1958), 15 U.S.C. § 717r.

"REHEARINGS; COURT REVIEW OF ORDERS

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the

order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States

upon certiorari or certification as provided in [section 1254 of Title 28].[1]

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

Section 7 of the Clayton Act, October 15, 1914, c. 323, § 7, 38 Stat. 731, amended December 29, 1950, c. 1184, 64 Stat. 1125-1126, 15 U.S.C. § 18.

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

"Nothing contained in this section shall apply to transactions duly consummated pursuant to author-

[1] As originally enacted (52 Stat. at 832), the bracketed phrase was as follows: "... in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

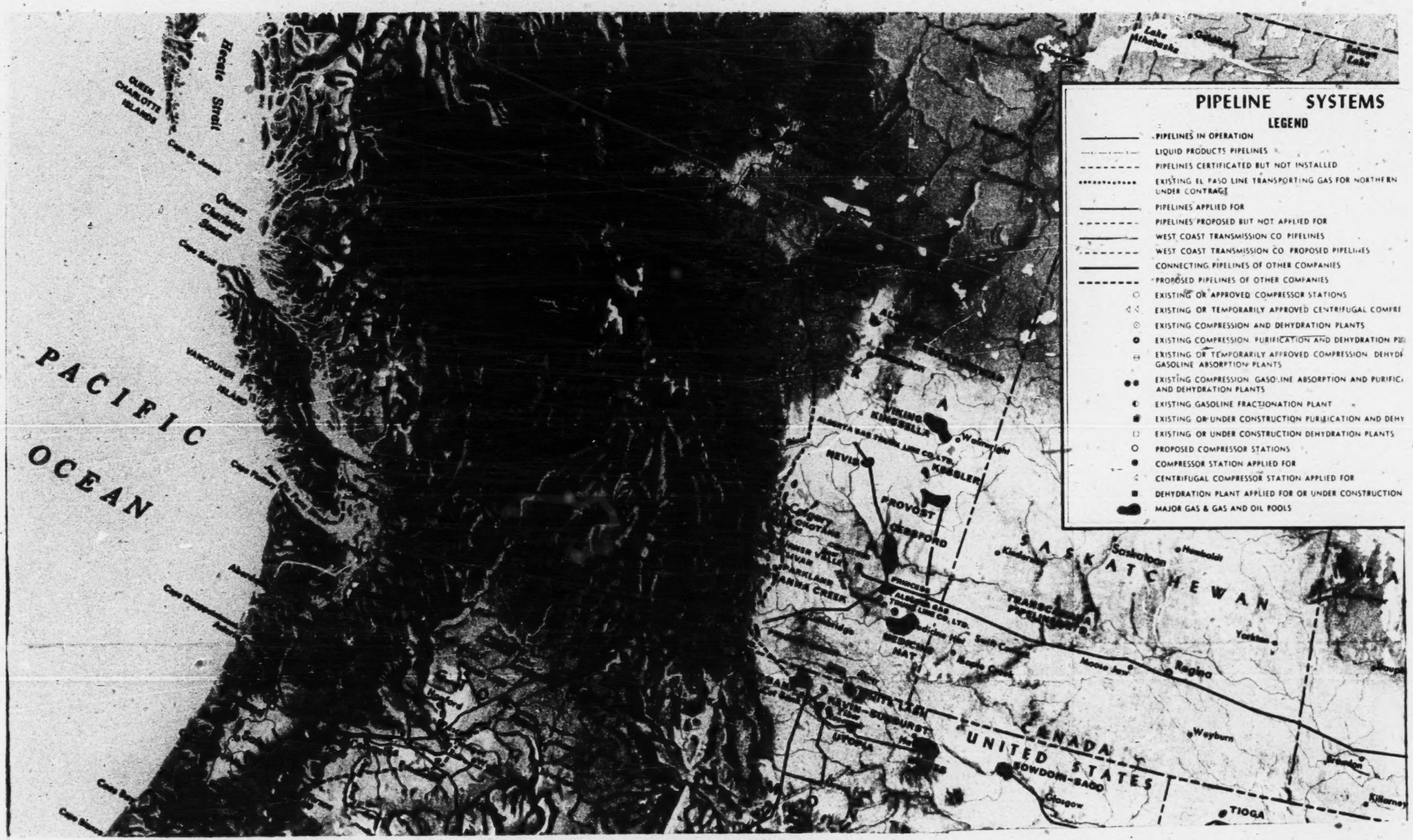
ity given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Section 1.26(5)(d) of the Rules of Practice and Procedure of the Federal Power Commission (1958):

"(d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *provided,* That any party shall, on timely request, be afforded an opportunity to show the contrary."

Section 1.31(c) of the Rules of Practice and Procedure of the Federal Power Commission (1958):

"(c) *Failure to except results in waiver.* Failure to file exceptions within the time allowed under this section shall constitute a waiver of all objections to the intermediate decision served. No matter not included in the exceptions filed as provided in this section may thereafter be objected to before the Commission upon brief or oral argument, or in an application for Commission rehearing; and any matter not included in such exceptions shall be deemed waived. Exceptions covering rulings admitting or excluding evidence not objected to at the time the rulings were made, will be unavailing."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South Coulee
Maple Creek
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Cardston
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Pincher Creek
Crowsnest Pass
Blairmore
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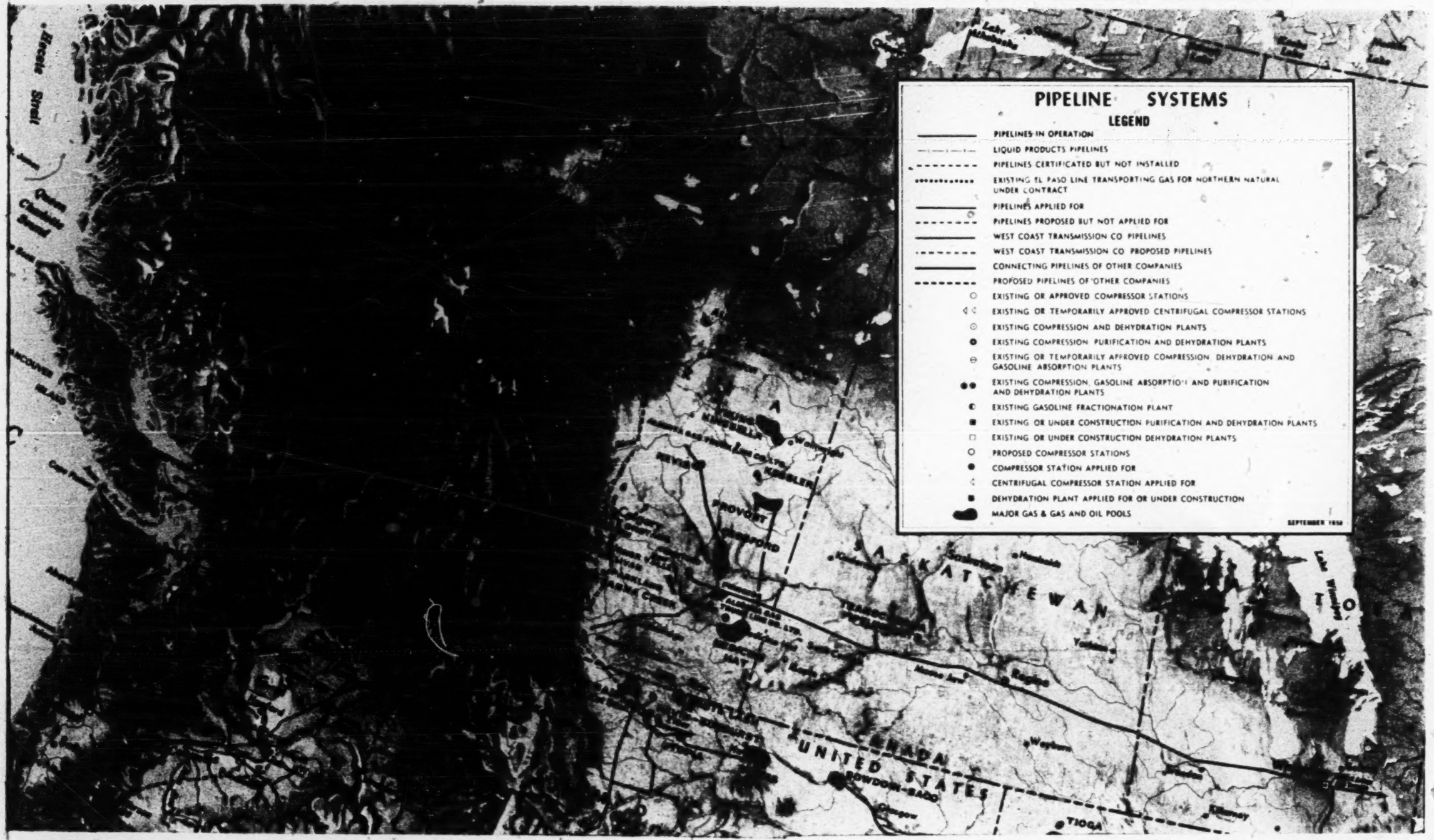
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